

Robert [unclear]
ARS NOTARIATUS.

O R,
THE ART AND OFFICE
O F A
NOTARY-PUBLIC,

As the same is practised in SCOTLAND.

IN TWO PARTS.

- I. Giving an Account of the Rise and Institution of the Office, and ancient and present State thereof.
- II. Containing NOTORIAL Instruments of all kinds.

To which is added, by way of CONCLUSION,
An Advice to NOTARIES, touching the right discharging of their Office.

Nondum lingua suum, dextra peregit opus.

MARTIAL.

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T H E

P R E F A C E.

THE design of the following sheets being to serve as a guide to Notaries in the most ordinary branches of their office, it is, with submission, hoped, that this small treatise will meet with a favourable reception from the public.

In treating of this matter, it has been endeavoured to comprehend in it the most material things that are contained in our acts of parliament or law-books relative to these ministers of the law, or any part of their office: and if the more skilful shall object, that I have dwelt a little too long on some things, and have inserted several long quotations when I might have referred to the books quoted; they will remember, that all are not endued with the same knowledge as themselves, and that this treatise is only writ for young

a 2 *practitioners,*

practitioners, and such as have not opportunity of consulting the books themselves.

In the several examples given, care has been taken to illustrate and vary the styles, so as one with a little practice may be able to apply them to any case that shall occur in the course of his business.

And, in the CONCLUSION, advice is given to the young Notaries towards a right exercise of this employment; and there I have taken occasion to shew, from the authority of the civil and feudal laws, and our statutes and decisions, the punishment inflicted on these ministers when they commit any malversation in their office.

1740.

C O N-

C O N T E N T S.

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Of the different kinds of Notaries, and
of their ancient and present state in
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O F F I C E
O F A
NOTARY-PUBLIC, &c.

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P A R T I.

A short account of the different kinds
of Notaries, and of their ancient and
present state in Scotland.

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T I T L E I.

*Of the different kinds of Notaries, and by whom
created.*

THIS employment of NOTARY is de-
rived from the Romans, among whom
there was a body of Notaries, erected
into a school or college, and governed by a
superior officer, called *Primicerius Notariorum*;
which signifies *primus*, or *in prima cera scriptus* :
for, before the finding out of paper, the an-
cients wrote upon waxen tables; from whence
comes the way of speaking in the Roman au-
thors,

thors, in *prima et secunda cera*, in *ima cera*, as in Sueton, in the life of Julius Cæsar, p. 86. Wherefore *Primicerius* in any office was the master or chief; as, *Primicerius clarissimorum Tribunorum Notariorum*, the emperor's principal secretary; *Primicerius sacri cubiculi*, the lord high chamberlain; *Primicerius Præfectorum prætorio*, the captain of the guards; *Primicerius Fabricæ*, the surveyor-general, &c.

This *Primicerius Notariorum* held the chief place in the college of Notaries, which is termed a *sacred and famous college*, l. 15. tit. 1. lib. 6. *Cod. Theod.* and was called the *Prince's Notary*. Under his care was the inspection of all dignities and employments, as well civil as military; and he oversaw the schools of arms, as well as the accountants, and kept the registers of the Imperial chamber. He is termed by Socrates, *Protonotarius*. He remained two years in his office. To him succeeded a helper, called *Secundicerius*; and to him a *Tertiocerius*, and to him a *Quartocerius*, who, according to the above names, kept the respective records of these offices. *Guthorius, lib. 3. cap. 9.* says, there were four divisions in the greater repository; the first was of the civil dignities; the second, of the military; the third, of the orders and promotions; and the fourth, of the consuetude or customs. He also repeated in the senate the laws established by the prince, as appears lib. 6. tit. 1. l. *oblationem* 14. in *Cod. Theod. data vi. kalend. M. recitata in senatu per Theodosium Primicerium Notariorum*,

riorum, DD. NN. Theod. XII. et Valentin. II. AA Coss. And this was the particular privilege belonging to the *Primicerius* of the Notaries, That he was not obliged to attend his function above two years ; and having ended his office honourably, the senatorial dignity was conferred upon him, and he was made equal to a proconsul, and received also the head band, as the muster and ammunition masters of war, and was preferred before all others to that office when vacant : *Vid. tit. Cod. de Primicerio, et Cod. Theod. eod.* His office is fully described by Claudian, in *epithalam. Pallad. et Celerin.* in the following verses :

————— *Cognomina sumpsit*
Plena ducum genitor : paulatim vetus ad altum
Princeps militiæ, qua non illustrior exstat
Altera ; cunctorum tabulas assignat honorum,
Regnorum tractat numeros, constringit in unum
Sparsas imperii vires, cuneosque recenset
Dispositos. —————

Mons. du Cange relates divers significations of the word *primicerius*. He observes, among other things, that it signifies him whom we call the chief singer, or master of music. He is called in French, *Le primicier*. In the church of Metz, he is the first dignitary of the diocese, and presides even the bishop in the assemblies of the clergy. At Venice, the dean of the church of St Mark is called *Primocirio*.

He is independent of the patriarch of Venice, and enjoys episcopal privileges.

From Cujacius, *vol. 3. ad l. 15. Cod. de Decurion.* we learn, that there was a certain number of tabellions, and that they were subject to the *primicerius*; and that none were admitted into the body, but such as were of good fame, skilful in the laws, and in speaking and writing; and that this was determined by the opinion of the college of tabellions.

The tabellions were employed about the agreements and bargains of private persons. They formed public instruments concerning them; whereby these writings became probative, and got effect in law, doing every thing as do at this day our Public Notaries, who make a note of what is done in affairs to which they are called, and form instruments thereon, which, when extended, they insert in their protocol, *Tiraquel. de jure constit. possessorii, part. 3. limit. 30. n. 32. 33. 34. 35. 36. et arg. l. 2. Cod. Theod. et l. 3. eod. de Decurion.*

Besides these, there were the *tabularii*, so called *a tabulis*, waxen tables. The office of the *tabularii* was, to get from the debtors of the fisk, obligations for paying the debts due to the public, and to make a record of them; as also to state and balance the accounts of the effects belonging to the fisk, or to great cities. They were the same with our accountants; as the *distolæ* were like our comptrollers of accounts.

The *scribæ* were appointed to dress and form the
the

the acts and judicial proceedings of the higher judges, and were called *scriptores notarii libellenses*; whose office now at this time is, to make up the acts of court, to write the testimonies of witnesses, allegations of parties, the orders, sentences, and decrees of the judges, and whom we call *clerks of court*. Besides these, there were other officers known in the Roman law by the name of *boethi*, *logistæ*, and *medogrammatei*, all employed in writing the fiscal affairs, in forming and calculating the public accounts; and were public slaves, and servants to the commonwealth.

But the tabellions were freemen, and not bond-slaves, as were the *tabularii*, *scribæ*, &c. until Arcadius and Honorius, *A. D.* 403, forbid, under severe penalties, any slaves to take upon them the office of tabulary or scribe, &c. which none but freemen were afterwards to exercise, *l. 3. Cod. de Tabul.*

There was another public servant called *tabellarius*, who carried from place to place, as he was directed, these *tabulæ*, or public writings, instruments, accounts, or judicial acts.

In after ages, when people were not so nice in the language, these words, *tabularii*, *scribæ*, *tabelliones*, and *tabellarii*, were promiscuously used to signify the same officer and minister of justice, such as we now call a *Notary*, *Præst. judic.* *Joan. de Arnono, cap. 3. n. 1. Qui secundum, &c.* because they were in ancient times every one of them concerned some way or other

about the same kind of instruments or writings : *Quæ personæ in usu juris Tabularii aut Tabelliones appellantur, nunc vulgo Notarios vocant, Vinn. partit. juris, l. 4. cap. 27. de fide instrumentorum* : and in our acts of parliament we use the words *Notar* and *Tabellion* conjunctively, *act 31. parl. 1469.*

Monf. Pasquier, in his *Recherches de la France, lib. 4. cap. 14.* says, that those who are called *Notaries*, were the ministers or servants and assistants to the tabellions, who not being sufficient for a multitude of business, to go to every place where their personal presence was necessary, were forced to take into their houses and family persons qualified to assist them in the exercise of their office ; which was done by the servant's making a note of the business, as a minute of the contract, &c. which was thereafter ingrossed by the tabellion ; who, that it might make faith, attested and signed it, and in ancient times, as is still done in foreign countries, appended his seal thereto : so that the compellation of *Notary* comes from those notes which they made and presented to the tabellion their master.

Cujacius, in his observations upon the 44th novel, says, That the occasion of that novel was to oblige the tabellions, when employed, to go to the parties themselves, and not send their scholars ; and that these scholars or servants should not make out instruments but in the presence, and by the knowledge of the tabellions : so that when the tabellions were
interrogated

interrogated upon any affair before a judge, they might not excuse themselves by pretending ignorance of the matter.

However, in process of time, these Notaries did separate from the tabellions ; or, it is more probable, that after the decease of the person whom they had served, they continued still the same employment, with the ancient name, and were by the sovereign power authorised so to practise.

In the first centuries of the church, there were Notaries who were ecclesiastical officers, their office being to gather and preserve the acts of the martyrs. They were seven in number, and every one had his station in the city of Rome. St Clement, the fourth pope, was the first who established these notaries, and assigned them their different stations in Rome, for to write the acts of the martyrs who should suffer there ; as we learn from the *Liber Pontificalis* of the third century.

St Fabien, the twenty-first Pope, considering that the scriptures in short-hand were very obscure, added seven subdeacons to these notaries, to the end that they should take care to write out, at length, without abbreviations, that which the notaries had written in short-hand. These notaries had likewise the care of the patrimony of the church.

When the Greeks speak of the Holy Notaries, they understand by that name St Mar-
cian and Martyrius. It is not that they practised the function of notaries, but because that
name

name was sometimes given to the subdeacons, to the *lectores*, and others, and that St Martyrius had been a subdeacon, and St Marcian a reader or singer; for these Notaries were for the most part readers, who ordinarily were promoted to higher degrees. Thereafter these Notaries were abolished, and custom brought in two other degrees of Notaries, to wit, the apostolical and episcopal.

The Apostolical Notary is one who receives and expedes acts or instruments in matters spiritual and beneficial, as the resignation of benefices, concordates or agreements, &c. He has his commission from the pope, confirmed and approved by the bishop of the diocese. The Episcopal Notaries are those made by the bishops; the number of which ought to be regulated in every diocese.

There is also in the court of Rome a college of twelve Protonotaries, who have a degree of pre-eminence above the other Notaries, and are called *Participantes*, because they have a share of the dues in chancery. They are ranked among the prelates, and they wear a purple robe, with a surplice, and a hat bordered with purple, with a twisted cord. They have upon their escutcheon, a hat, from whence hang two rows of green tufts or knots. They take place of all prelates who are neither priests nor bishops. Their office is to assist at the precognition of bishops, opening the mouths of cardinals, the canonization of saints, and to expedite in higher causes the acts which the
simple

simple Apostolical Notaries do in inferior ones.

Protonotarius, or *primus notarius*, among the English, is a chief officer or clerk of the common pleas and King's-bench; and for the first named court there are three protonotaries, and the other hath but one. He of the King's-bench records all actions civil, as the clerk of the crown-office doth all criminal causes in that court. Those of the common pleas, since the order 14. *Jac. I.* upon an agreement entered into between the protonotaries and filacers of that court, do enter and inrol all manner of declarations, pleadings, assizes, judgments, and actions. They make out all judicial writs, except writs of *Habeas corpus* and *Distringas jurator*; (for which there is a particular office erected, called the *Habeas corpora office*); also writs of execution and of seisin, of privilege for removing causes from inferior courts, writs of *Procedendo*, of *Scire facias* in all cases, and writs to inquire of damages, and all processes upon prohibitions, on writs of *Audita querela*, false judgment, &c. They likewise enter recognisances acknowledged in that court, and all common recoveries, and make exemplifications of records, &c. 5. *Hen. IV. cap. 14.*

The power of making Notaries appertains to the sovereign prince, or to whom he gives a commission for that effect; so that a judge, or any other magistrate in the state, without a special commission, cannot create a Notary; which lawyers call *actus summi imperii*, and recount *inter regalia*.: for, as the judge hath
from

from the sovereign the ordinary jurisdiction or power of judging, so the Notary obtains a licence to write instruments whereunto full faith is given, *Wesenbec. ad tit. ff. de fide instrum. n. 3.* and thus becomes a public person, *Tiraquel. de jure constit. possess. part. 3. limit. 30. n. 27.* and is therefore called Notary-public: and *Rob. Maranta spec. aureum, part. 4. distinct. 18. n. 3.* and *Tiraquel. de jure constituti possess. part. 3. limit. 30. n. 28.* call him *judex chartularius*, a chartulary judge, exercising voluntary jurisdiction, *i. e.* being required by the good-will of parties; for he can do nothing of his own accord against any unwilling to employ him; and he may perform his duty at any time by night or by day, in every place.

The emperor of Germany, through his right to the seat of the Roman emperors, and to the states of Italy, and by his title of emperor, pretends a succession to all that ever belonged to the ancient emperors of Rome, that is, to all the countries that were ever subjected to the Roman empire; and thereupon pleads, that the Notaries created by him, who are called *Imperial Notaries*, may exercise their office within any kingdom in Europe, though now governed by an independent sovereign of its own.

The pope of Rome, in like manner, ambitious of temporal and worldly dignity, in imitation of the Roman emperor, pleads for an universal jurisdiction, not only over all Europe, but also over the whole universe; and though
at

at first the popes claimed only a spiritual power, yet nevertheless, when occasion offers, they direct their aim to a temporal sovereignty; and too often they have succeeded in their design, to the great desolation and utter extinction of many princely families. Upon this foundation of an universal jurisdiction, the pope pleads, as well as the emperor, a power to create universal Notaries, ecclesiastical persons called *Apostolical Notaries*, who exercise their office both in spirituals and temporals over all Europe, and exclude the Imperial Notaries, who are only laics, from meddling in spiritual affairs.

There is a third kind, called *Regal Notaries*, created by the several kings and sovereigns, with power to practise within the kingdom and territory of the prince who gave that commission; and these Notaries being laic persons, durst not, in time of Popery, under pain of excommunication, meddle in ecclesiastical matters, which were made peculiar to the spiritual Notaries.

When the Roman empire was put to confusion by the invasion of the barbarians, several provinces and cities aspired to an independent sovereignty; which gave rise to many petty principalities, dukedoms, counties, and to several republics, who assumed to themselves within their own territories, all the powers with which the emperors were vested, and among the rest that of constituting Notaries: and even

ven in that part of the empire which is annexed to the dignity of the German emperors, the emperor makes princes, dukes, earls, barons, and erects lands into principalities, &c. and declares several cities and towns Imperial, *i. e.* independent of any other but the body of the empire; giving to the prince, &c. and magistrates of the Imperial cities, a power of making Notaries, to practise within their own territories.

In imitation of which, the pope of Rome hath made his archbishops and bishops to have the dignity, title, and precedency, some of a prince, others to use that which belongs to a duke; and hath erected their bishoprics into principalities, dukedoms, &c. with the same power of making Notaries: and, in the several kingdoms of Europe, which are all divided into archbishoprics and bishoprics, hath given to the several archbishops and bishops authority to make and appoint spiritual Notaries, with power to practise within the diocese of the bishop who gave the commission.

These regal and provincial laic Notaries cannot, in right, practise in any other places than those subjected to the authority of the king or prince who created them; for, as was said before, that extent of power pertains only to the Imperial and Apostolical Notaries.

But as to the Diocesan Notaries, (whose title was thus, *Ego P. G. Notarius Publicus, clericus diœceseos Glasguensis, &c. i. e.* I P. G. Notary-public, one of the clerks of the diocese

cese of *Glasgow, &c.*), I know not if they might practise without their own diocese; for though the spiritual character and power to teach and administer the sacraments was universal, I know not if that of Notary was so too. However, as they were not allowed to preach in an extraneous diocese, without the permission of the bishop of it, it may be thought, that, without his licence, they could not, within that diocese, take up, form, and extend notorial instruments, concerning affairs pertaining to persons living therein.

The pope stretching his ambition too far, and thereby incroaching on the prerogative of Christian kings, made them to open their eyes, and to look after means to prevent the evil consequences of these tyrannical usurpations. I find *Fr. Caldas Pereira*, in his treatise, *De jure emphyteutico*, lib. 3. cap. 7. n. 17. notices, that by the *Lex regia* of the kingdom of Portugal, lib. 2. tit. 20. it is declared, all instruments of the Apostolical Notaries, in so far as concerns profane or temporal affairs, are not to be reckoned public, *i. e.* are destitute of all faith, proof, use, or authority. And though *Christinaeus* (in his *Decis.* 153. n. 20. upon the title *de fide instrum.*) observes, That the Imperial and Apostolical Notaries are every where enabled to make instruments for ecclesiastics and laics; yet it is more true, that their power is confined within the ecclesiastical itate, and the *German* empire: for it is not rational to think,

that it can extend beyond the territory of the constituent. *Vide Perez. ad Cod. tit. de fide instr.*

T I T L E II.

Of the Indiction.

THE indiction, before the reformation, was an essential part of a formal instrument ; for, according to the Canon law, the omitting of it will vitiate the instrument ; wherefore it was thought not foreign to our present purpose, seeing it was formerly used in Scotland, to give this short account of it.

Indiction signifies the space of fifteen years, at the end of which a new Indiction begins. Formerly it signified the admonition given to the subjects, to prepare themselves for payment of the tribute, before the collections were exacted, *l. ult. Cod. de indict. et arg. l. 10. Cod. de muneribus patrimon.*

Indiction cannot be made but by him to whom it is competent, either by law, or the right of empire, *l. un. Cod. de superindict.* The indiction was likewise put on every lustre, or five years, for gold, silver, and iron. Indiction is called by Cicero, what is collected, *collation*, *symbols*, *εραρος*, vulgarly *tax*, like to a poll. Cassiodorus mentions first, second, and third. Some were canonical, and made according to the law ; others extraordinary, decreed by the magistrates for any unseen occasion, *l. 1. Cod. de indict.*

Dionysius,

Dionysius, a certain Roman abbot who lived about a thousand years ago, writes, that the indictions were instituted by Augustus Cæsar, before the coming of Christ, in the first year of the hundred and ninety-fourth Olympiad; for at the fourth indiction he writes that our Saviour was born; which Beda also affirms in his *cap. 47. de natura rerum*.

But under Augustus, it not only denoted the year in which tributes were wont to be paid to the Romans, but also it shewed how many years it was after the payment of the tribute; for, as the Romans had dominion almost over the whole world, and had made the remotest countries tributary to them, Augustus therefore, three years before the birth of our Saviour, ordered, that those who lived in the remotest places of the empire should only (because of the difficulty of the roads) at the end of every lustre, or fifth year, pay their tribute; and in the end of the first five years they should pay gold, as a type of dominion; in the end of the second five years, silver, for the soldiers pay; and at the end of the third five years, copper and iron, for repairing the arms.

But now, the word *indiction* is commonly taken for the regulation of years, as well in public as private actions; and it is generally thought to direct the order of time, and to take away errors which might fall out in chronology. This way of reckoning by indictions was first invented by Constantine the

Great ; for neither public nor private writers before his time make mention of indiction in this sense : and that the eighth before the Calends of October, in the year of our Saviour 313, the first indiction began, in which year Constantine defeated the tyrant Maxentius, *vide Craig, lib. 2. diæg. 7. de indictione* : where you will also see the following verses for finding the indiction :

*Si per quindenos Domini diviseris annos,
His tribus adjunctis, indictio certa patebit ;
Si nihil excedit, quindena indictio currit.*

The emperors, to the end that this constitution might not easily be forgot, decreed, as also afterwards the popes, that no instrument drawn up by Public Notaries should be held firm and valid, unless the year of indiction was specified therein. According to the statute of the emperors, the cycle of indiction begins the 24th of September, at which time, because of the maturity of the grain, the tributes may be best paid ; but, according to the decrees of the pope, it begins at the birth of Christ : wherefore the Imperial Notaries, officiating by the pope's authority in the courts at Rome, change the indiction, as appears in the acts of the council of Constance.

T I T L E

T I T L E III.

Of the ancient and present state of Notaries in Scotland.

BEfore the reign of King James III. the Papal and Imperial Notaries did practise in Scotland until the third parliament of that prince, holden at Edinburgh the 20th of November 1469; at which time an act of parliament was made, bearing this title and inscription, *That Notars should be made be the king, and not be the emperor.* The preamble of which act, in regard it is cited to assert the independent sovereignty of our kings in Mr Anderson's *Independency of Scotland*, I shall here subjoin. *It is thought expedient, that seeing our Sovereign Lord hath full jurisdiction and free empire within his realm, his Highness may make notars and tabellions, whose instruments shall have full faith in all causes and contracts civil within the realm; and in time to come, that no Notar made by the emperor's authority, have faith in contracts civil within the realm.*

The Notaries in Scotland, at this time, who had been created by the authority of the emperor, were not wholly rejected; for first, by the above act it is ordered, *That full faith shall be given to all instruments given of before by the Imperial Notaries as they are of avail;* and next, they are deprived only in case they be not examined by the ordinary bishop, and approved by the king.

The authority of the Papal Notaries is not so expressly abrogated, though it may be thought to be done indirectly, through the manner of expressing the act in the above-mentioned act of parliament relating to these, which is thus, *And that full faith be given to the Papal Notaries in times bygone, in all their instruments*; and also, because nothing is said concerning their authority in time to come: whereby it would seem, that our kings did restrain the pope's power in matters civil.

It may be further observed, from the narrative and preamble of the same act, that the instruments taken by the king's Notaries were to make faith in matters civil only, the spiritual being left where they were, *i. e.* to the Clerical Notaries; and that the king and his parliament intended only to restrain the pope's power in matters civil.

In the end of the said act 31. *parl.* 1469, it is ordered, *That the Notaries to be made by the king shall be examined before their ordinaries, bishops, and shall have from them a certificate of their faith, good fame, science, and ability, or fitness for the office.*

The clergy being the only persons knowing in the laws civil and canon, were most qualified to examine these Notaries; and it is probable, that in all the kingdom there were none so fit. Besides, in the ancient times, and when the above act was made, none other than the clergy either aspired to this office, or were admitted to it: because,
first,

first, it behoved the Notaries to have a reasonable understanding in the Latin tongue, wherein the instruments of greatest moment were to be written, and none except the clergy were at pains to study it ; for that being the language of the church, there was an absolute necessity for them to know it. And, *next*, It was requisite for the *Notar regni* to have skill in the style and form of all writings, evidents, and securities, with a little smattering of the law, which the meaner laity did not read, for want of ability to follow that study ; and the gentry, or nobles, who might possibly be learned in the law, disdained the meanness and servility of the employment of a common Notary. *Thirdly*, Lay men were only capable of civil affairs, whereas the clergy were in capacity to serve in both spiritual and temporal matters ; by which they had a great advantage over the other lieges, who could not find in this office of a Notary the encouragement that Ecclesiastical Notaries would meet with : and therefore it is likely, that laymen never sought after this office ; for, in all the ancient attestations of Notaries which I have seen, they are called *clerks of one or other of the dioceses in the kingdom* ; which designation still continues at this day, though now none but laics are admitted Notaries ; and at present they generally take that designation from the diocese in which they were born, or from that wherein they design to reside.

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The king and parliament being jealous of the pope's usurpation and incroachment upon the prerogative-royal, did, by this *act 3^d. parl. 1469*, ascertain the king's right to create Notaries for civil affairs; so that it may be thought, that the apostolical or ecclesiastical Notaries, who, after due examination and trial, were allowed by the pope or bishop alone, could not after this time, without licence from the prince, meddle in temporal matters, as they had done in times past.

The power of the bishops over Notaries has been very considerable; for, by *act 64. parl. 1503*, it is statuted, *That all bishops-ordinaries call before them the Notaries within their diocese, and make them to be examined upon their knowledge, and take inquisition of their demeanour and fame, and deprive and punish the culpable according to their demerit; and that they take inquisition of them that use false instruments, and punish them where it belongs to their office, or send them to the king.*

It may be thought that all Notaries, as well temporal as spiritual, were subjected to the authority of the bishops, in the examination and inquisition enjoined by this act: but because the crime of falsehood was by the laws, canon and civil, to be punished more severely than the ecclesiastical judge could inflict, which could not go further than penance or excommunication, (which is meant by the words, *in so far as it belongs to his office-ordinary*); therefore the bishops are ordered to send the
users

users of false instruments to the king, in order to be punished by the civil magistrate.

The difference and distinction between Notaries into Papal and Regal, *i. e.* spiritual and temporal, is manifest from the last cited *act* 64. *parl.* 1503; from which it also may appear, that to entitle the Papal Notaries to meddle in civil affairs, it behoved them to be examined by persons deputed by the king, in order to be made royal. The words of the act are, *And the persons that they find acceptable, that they send them with their writings to the king's Highness, who shall depute certain persons to examine them; and if they be gainand, i. e. if they be fit, proper, suitable, and qualified, to make them regal, if they be not regal of before.*

This is farther manifest from the *act* 76. *parl.* 1540, ordering every sheriff to call before him and examine all Notaries, laic men, within his sheriffdom; and, by an act in judgment, to admit such as are *famous*, (*i. e.* men of good reputation), and able to execute the office. Yet it is not to be thought, that the power of creating Notaries was, by this law, conferred upon the sheriff, who never had such jurisdiction; but that the sheriff being the king's chief magistrate in the shire, constitute to put the laws in execution, and to see them duly observed by the lieges, the king and parliament thought fit, in order to put a stop to the confusion and falsehood which the multitude of Notaries had occasioned, to order the sheriff to try the qualifications of the Notaries living within

within his territories, and to authorise such as were honest and skilful to continue in the office, &c. and to discharge all others. And that this is the genuine interpretation of this act, is clear from the last part of it, ordaining all Notaries which were to be created after the year 1540, not to exerce their office, till they should first appear before the sheriff, and get their admission, with their sign and subscription, recorded in his books, &c. And in another clause of this act, all ordinaries are enjoined to do the like with respect to Notaries within their diocese, who are spiritual men. And further,

By this act, the sheriff is to discharge all, except writers, notaries, and scribes in the king's courts of justice, who shall be admitted by the Lords of Council. I thought proper to touch this clause, lest any, through inadvertency, might fall into a mistake, and think, that at this time, and by this clause of the act, the Lords of Council, *i. e.* of the Session, had a power to admit Notaries; whereas by these words, *writers, notaries, and scribes of the king's courts*, which are synonymous, no others are understood than the clerks of these courts; for, as was observed before, the office of the *scribae*, and of the *tabularii*, was like unto that of our clerks: though the office is still the same, yet the ancient name of *scribae* is changed to the newer one of *clerk*. In the preamble of *act* 81. *parl.* 1540, it is noticed as a great inconveniency, that instruments and
acts

acts made by the scribe of the court, bear one way, and those taken in the hands of other notaries bear another way; where by the scribe of the court is meant the clerk.

And also it was noticed before, that the names *tabularii*, *tabelliones*, and *scribæ*, were confounded, and sometimes made to signify the same office and employment, and were so used with us, as is clear from the same *act* 81. *parl.* 1540, whereby it is statute, *That all instruments, notes, and acts be made and taken in the hands of the scribe and notary ordinary of the court:* and in the end it is said, *of the notary and scribe of court:* and in the preamble of *act* 31. *parl.* 1469, the names *notary* and *tabellion* are made synonymous, expressing the same office. And as *scribe* and *notary* were promiscuously used, so are also the names of *notary* and *clerk in court*, as is clear from the *act* 78. *parl.* 1540, where it is said, *Because great credence and faith is given to the notaries and clerks of court, it is statuted, that all sheriffs, &c. present their clerks and notaries in presence of the Lords of Council, &c.*

Further, the clerks of session, or of any other sovereign court within Scotland, are, upon their admission, and by virtue thereof, empowered to do every thing falling within the verge of their office, as fully and amply as if they had, in the solemn and formal manner appointed by law, been admitted Notaries: so that instruments in the hands of these clerks in processes, and acts judicial in their court, make as much faith as the instruments of any

Notary-

Notary-public, *Mackenzie's observ.* on *aēt* 79. *parl.* 9. *Q. Mary.* Now the clerks of session are admitted in a way very different from that of creating a Notary-public.

To return to the authority of our bishops, with respect to Notaries: By *aēt* 24. *parl.* 5. *Q. Mary, 1551,* *The sheriffs are ordered to bring or send all notars, temporal men, within their shire, and the ordinaries shall bring or send all spiritual notars to the burgh of Edinburgh, to present them to the Lords of Session, &c. to be examined, and, if qualified, to be admitted.* From which it is evident, that the ecclesiastical Notaries were under the direction of the bishop, and the laic Notaries subject to the command of the sheriff. But in the acts of the parliaments subsequent to this, made concerning Notaries, I find no more regard is paid to the bishops; for by *aēt* 43. *parl.* 6. *Q. Mary, 1555,* (three years before the reformation of religion from Popery, which, in Scotland, is stated to the year 1558), *All Notaries, both spiritual and temporal, are ordered to come personally to Edinburgh, and to compare before the Lords of Council, bringing with them their creation and protocols, to be examined; and such Notaries as should be found qualified, are to be admitted by the Lords to the office of Notary.* And by this act it is further ordained, *That no Notary, by whatsoever power he be created, shall use the office of Notary within the realm in time coming, except he first present himself to the said Lords, shewing his creation, and be admitted by them thereto.* The contemners are
ordered

ordered to be punished as follows: *Their moveables are to be escheated, and applied to the sovereign's use; and they are to want their right hand, and to be banished the kingdom for ever.* But although this act ordains *all Notaries, both spiritual and temporal, to come personally to Edinburgh, and compare before the Lords of Council, &c.* yet it is not to be thought that this law gives the Lords authority of making Notaries, either spiritual or temporal; because the power of creating of the first kind was the bishop's right, Popery at this time being maintained in its full force. And the design of this act with respect to the Lords, is the same as that in the 1540, with respect to the sheriff; for the power of admitting candidates to the office of Notary was not conferred on the Lords of Session till after the reformation, when the tyranny and usurpation of the Popish clergy was dashed in pieces. And since the reformation, the restraint of the church's power in this behalf, is further established by *act 76. parl. 9. Q. Mary 1563, statuting, That no person shall take upon hand to exerce the office of a Notary, by no manner of creation to be made in time to come, under the pain of death, unless they be created by the sovereign's special letters, and thereafter examined and admitted by the Lords of Session, &c.* And, in the end of the act, *If any person attempts in the contrary, in creating or making Notaries, or in using the office otherwise, they shall be punished to the death.* So that, by this act, the Lords of Session have the full power and jurisdiction of ad-

mitting Notaries, who may exerce the office in all matters legal, spiritual, and temporal, over all the kingdom, as fully as any other Notary, apostolical, imperial, or regal, could have done in ancient times.

This act, in so far as relates to the manner of creating Notaries, *viz.* by the sovereign's letters, had not been in use these many years. Sir George Mackenzie, in his observations on the act, informs us, that they were not in use in his time : however, they are still ingrossed in the Notary's act of admission. From these acts it is manifest, the bishops power to make notaries was abolished. But further, the spiritual Notaries, who had been duly created by the bishops in times before, are ordered to be of new examined by the Lords of Session ; and, if qualified, to be by them admitted to the office of Notary. And now, at this time, the clergy cannot meddle in the office of Notary ; for by *act 133. parl. 8. Ja. VI.* all ministers who exerce or officiate as Notaries, are to be deprived : yet the act does not expressly annul the writs ; and therefore, a contract of marriage, subscribed by a minister in place of a Notary, was sustained, though it was found, that the minister was thereby depriveable, 12th July 1631, *Hassingtoun contra Bartilme*, observed by Du ie. Nevertheless, by this act, ministers may officiate as Notaries in testaments.

Before I shew the present form and way of admitting Notaries, I shall give the definition of

of a Notary, and declare the requisite qualifications of the person to be admitted.

A Notary then is, *A public person, who, upon examination and trial, being admitted by the Lords of Session, gets power to form and take instruments in any honest and lawful business, which make faith in law.* Whoever aspires to this office must be of a competent age, which is accompanied with judgment; no pupil, or one nearer to pupillarity than to majority, is received. And seeing a Notary is a kind of judge, the civilians call him a *chartulary* one. It is reasonable to circumscribe his age, by the same rule that is made for that of judges; and as, by the laws of Scotland, none can be a judge until he be twenty-five years of age complete, therefore the Lords of Session, by their act of federunt 1595, declared, they would only receive to be Notaries such as were past twenty-five years of age: but this act is not observed; for now they are admitted before twenty-five, and the age is left to the discretion of the Lords.

As all candidates for any civil public office, so, in this of Notary, the person must be of untainted fame and reputation, of entire honesty, free from any thing that infers infamy, or any suspicion of it, *Brun. ad tit. Cod. de infamibus, n. 4.* And that they be deserving of trust, for great veracity and fidelity is requisite in one who, by his writing and subscription, bestows a formal being and public authority on a deed, *Perez. ad Cod. tit. de tabular. scribis,*

&c. n. 13. For great faith and credence is given to Notaries, *act* 78. *parl.* 1540. And the constitution of the emperor Maximilian, in the year 1512, § 1. in this behalf is, *Quod circa personas approbandorum, vel denuo instituendorum, habeatur ratio conditionum et qualitatum earundem*, &c. And the parliament in the year 1503, in the reign of K. Ja. IV. in the *act* 64. takes notice of the many complaints of the lieges, that, through the falsehood of Notaries, honest men were not sure of their heritage, nor clerks of their benefices; therefore inquisition is to be made of the demeanour and fame of all the Notaries in the kingdom, and power given to deprive the culpable.

And because a Notary is a person that deals in law-matters, therefore he must have a sufficient knowledge of the employment; for none but such as are famous, and able to execute the office, are to be admitted, *act* 76. *parl.* 1540. And these external and acquired qualifications that the law requires, according to *act* 45. *parl.* 11. K. Ja. VI. are, That the Notary to be admitted shall have a reasonable understanding of the Latin tongue, so as to write it congruously; that they have served truly for seven years a Lord of Session, a commissary, writer to the signet, or the clerk of some sherriffdom, stewartry, bailiery, or of an head burgh; and that not passingly now and then, but attended and ministered to the judge, writer, or clerk, in matters respecting their office during the above space; and at the time of their

their examination report to the Lords of Session a testimonial of their truth and qualifications.

This act narrates, that many Notaries being admitted upon slender trial, are, for the most part, ignorant of the common course of law, form, and practice, which ought to be observed in their instruments, contracts, and other securities, not knowing what may stand by law, and what not, which hath engendered many pleas among the lieges; for remedy whereof the act was made.

The Lords, by the above-cited act of sederunt 1595, ordained those only to be received who can write an evident in Latin or English, and who had been apprentice to a Notary for the space of five years.

Any person who at present desires to be admitted Notary, goes to the clerk to the admission of Notaries, who formerly had his commission from the clerk-register, but now, since the accession of his present Majesty, he has it immediately from the king; and he presents him to the Lords, by giving in a petition for him. Which petition is signed by the intrant, and bears in substance, *That he having spent some part of his time in studying the laws, forms, and practices of this kingdom; and being now inclined to use and exercise the office of a Notary-public, craves therefore to be examined, and, being found qualified, to be admitted; and that the Lords may grant warrant to the clerk to the admission of no-*

taries to mark his protocol-book, receive his cautioner, &c.

This bill, before it be given in to the Lords, must be attested by one or two advocates, and as many writers to the signet, setting forth their knowledge of the person desiring to be admitted, of his good fame, and qualifications to exercise the office of a Notary; for by act of federunt, 30th July 1691, it is enacted, *That none be admitted Notar but on a petition given in to the whole Lords in presence, with a certificate subscribed by credible persons, that the petitioner is of good fame, and has had good breeding for qualifying him to exerce that trust; and that the Ordinary on the bills, and other Lord Examiner, being met together, take exact trial of the person's knowledge and qualifications, before he be admitted.* This petition being read in presence, the Lords generally remit to the Lord Ordinary on the bills for that week, and the next week's Ordinary, to take trial of the petitioner's qualifications; and one of the four ordinary macers of the session, at twelve o'clock, takes the intrant, with his bill, to the two Lords Examinators, appointed by the remit on the back of the petition; who, by the above-cited *act 45. parl. 11. K. Ja. VI.* are to cause the person to be admitted give, in their presence, a full proof of his writing and congruity, by forming some evident; as, a charter of ward, blench, feu-farm, burgage, mortification, or apprising, a precept passed on a retour, a precept of *Clare constat*, an infestment

ment upon resignation *in favorem*, or *ad perpetuam remanentiam*, an instrument of seisin, a contract, a compromit, an acquittance, a procuratory, a tack, a reversion, an obligation, or some other common form of evident.

And if the Lords find the intrant qualified, they mark and sign the same upon the back of the bill.

The bill being read next session-day by one of the principal clerks, with the report of the examiners, the Lords admit the petitioner to be a Notary-public, and remit to the Lord Ordinary on the bills to take his oath of assurance, allegiance, abjuration, and *de fidei administratione officii*, and grant warrant to the clerk to the admission of notaries to mark his protocol-book.

The petition, with the deliverance thereupon, is given to the person admitted; who, with the clerk to the admission of notaries, goes to the Lord Ordinary on the bills, and he administers to the person admitted the oaths aforesaid.

The oaths being taken, and subscribed by the intrant, his charges of admission, besides two shillings Sterling paid, as the clerks of session their dues for administering the oaths, are as follows.

	<i>L.</i>	<i>s.</i>	<i>d.</i>
To the clerks of session their dues with the bill, — — —	2	18	0
To the macers, — — —			
To a sheet of stamped paper, for writing the act of admission,	24	3	0
To the clerk of admission of no- taries, — — — —			
To his servant, and value of the protocol-book, — — —	7	10	0
Total, beside personal charges,			
	104	04	4

£0. 15. 0 Sterl.

The Notary being thus admitted, in his protocol-book his act of admission and cautionry, with the sign and subscription-manual that he is to use at the end of all public instruments, are inserted. All which shall be shewn in the next title.

T I T L E IV.

Of the Notary's Protocol and Cautioner.

THIS word *protocol* is derived from the Greek *πρῶτος* *primus*, and *μῶλον*, *membrum*, because it is the first draught of an instrument. It is defined by Viglius, in the title of the *Instit. de test. ordin. n. 5.* to be *the first sketch of the business, made for the sake of memory, from whence afterwards the instrument is to be extended.*

The emperor Maximillian, in his constitution concerning Notaries, § 2. ordains, *That every*

every Notary have a protocol, and that he keep it carefully, and write in it in order with his own hand, all the acts and instruments verbatim, to which he was Notary ; and that he keep and preserve a register of them, so that recourse may be had to the protocol or register, both in order to supply instruments that are lost, either before or after the Notary's death, and likewise to clear any doubt or question that may arise from them.

By the laws of Holland, the Notary must write down in his protocol all instruments to which he was Notary, having the subscriptions of the parties and witnesses, and that of the Notary himself ; and thereafter transcribe the instrument therefrom, bearing, that it agrees with the protocol. Which if the Notary neglect, he is to be deprived of his office, and undergo an arbitrary punishment, *Edict. Car. V. 4. Oct. 1540. art. 13. vol. 1. placit. Holl. p. 318.* Nevertheless the instrument is not thereby improven ; for this would be affording an opportunity to Notaries corrupted by bribes, or otherwise, to render useless all instruments to which he was Notary, *Radelan. cur. Ultraject. decis. 125. n. 2.* And by the civil law, instruments extracted from the protocols of Notaries, written by the Notary himself, are held as authentic, and not as copies, because they are written by a public person ; wherefore they make faith in judgment, although the protocol be lost, *arg. l. 17. Cod. et l. penult. ff. de fide instrum. et Fachin. controuv. jur. lib. 11. controuv. 38.* And it may be
inferred

inferred from the 77th *aet*, *parl.* 6. *Ja.* V. that, at that time, an extract from a protocol was probative as a principal instrument.

By *aet* 43. *parl.* 6. *Q.* Mary, *All Notaries are ordained to produce their whole protocols, in order that they may be marked by the Lords, the leaves numbered, and the blanks marked in presence of the Notary ; and these protocols to be delivered back, without any inspection or reading.* And,

By *aet* 45. *parl.* 11. *Ja.* VI. *All Notaries are ordained, betwixt and the first of January 1588, to bring and present before the Lords of Session their protocol-books, to be considered by them. The Notaries failing to present their protocols, shall not only be deprived, the instruments given after forth by them declared null ; but also they shall be pursued as transgressors of the king's laws and acts of parliament, and punished as persons defamed, and unworthy to bear office or place of credit thereafter.*

In all the former acts concerning Notaries, there is no mention made of his cautioner, until this *aet* 45. *for the Lords*, by this act, are, at the inspection of the protocol-book, to know how many of the cautioners are alive, that, to the contentment of the Lords, other new and sufficient cautioners be found in place of the cautioners deceased, or who shall be found insufficient. And it is likewise statuted by this *aet*, That the bonds and acts of each cautioner shall extend against his heirs, and that each cautioner to be found in time coming by Notaries, for due administration in their office, shall be in special obliged that their protocol-books shall, within fifteen days after the Notary's decease,

decease, be brought to Edinburgh, and delivered to the clerk of register, or his deputes, who shall be holden to satisfy, at the sight of the Lords of Session, the reliēt, bairns, or executor of each Notary, for the same. The protocol-books are to be kept in the king's register, and the clerk of register and his deputes shall be answerable therefore, and make the same patent to all the lieges having interest, upon reasonable expense. The reason why they are ordained to be brought to the register is, that false papers may be hereby tried, and lost papers may be made up; for if an instrument be lost, the person in whose favour it was at first made may raise an action before the Lords, craving, that it may be made up out of the Notary's protocol: and this, being *nobilis officii*, cannot be done before inferior courts; *vide Mackenzie's observ.* on *act.* 45. *parl.* 11. Ja. VI. But the above act has not been duly executed, as appears from *act.* 22. *parl.* 22. Ja. VI. And the reason there given for the non-execution is, *The intolerable charge it would draw upon the clerk-register, to give satisfaction to the reliēt of Notars for their protocols, in regard of the great number of these books.* Wherefore,

The king and parliament, by this act, discharges that part of the former, *ordaining the clerk-register to give satisfaction to the reliēt, &c.* and ordains all persons, reliēts, children, executors, or others, havers of any protocol-books, as well of Notaries already deceased, as of Notaries that shall happen to decease at any time hereafter,

to

to inbring these books to Edinburgh, and deliver them to the clerk of register, or his depute, to be appointed by him for that effect, under the pain of L. 100 Scots ; at the delivery and inbringing of which protocols by the reliēt, &c. the clerk-register, or his depute foresaid, is ordained to make a note of the names of the said reliēt, &c. of the defunct Notaries, to the effect that when any shall pursue for a transumpt of any instrument forth of the same, he shall be astricted to summon the reliēt, &c. to the end satisfaction, at the modification of the Lords of Session, may be made to them. And by this act it is declared, That the foresaid clause of this act, for inbringing of protocols, extends not to clerks of burghs-royal, whose reliēt, &c. are holden to deliver the same to the magistrates of the burgh, to be made forthcoming to all having interest.

And by act of federunt, the 29th July 1680, it is ordered, That letters on six days be direct at the clerk-register's instance, or his depute to the admission of Notaries, charging the reliēt, executors, and cautioners of Notars, to bring in, and deliver to them the protocols of deceased Notaris, conform to the acts of parliament ; and also charging Notars who have informal or defective protocols, to produce them at the head burgh of the shire where the Notary does reside, before the said depute ; and when cautioners are insufficient, to renew the same ; and that general letters be directed, at the clerk-register's instance, for that end, on a list subscribed by him.

In a decision, 19th February 1680, the Lord Register *contra* Sir William Primrose, clerk

clerk of the Notaries, it was found, That the Register's depute, called *the clerk of the Notaries*, was deprivable, for not calling in the protocols of deceased Notaries by the space of five years ; to which the Lords found him actually obliged, though it was alledged, That by the acts of parliament he was only obliged to receive the protocols when they were brought in, but not to call for them ; nor was it possible for him to know when Notaries died ; and therefore, by the above-mentioned *act 45. parl. 11. Ja. VI. sheriffs, &c.* are ordained to acquaint him of the death of Notaries within their jurisdictions : for it was urged, that the obligation to bring in the protocols being committed to this clerk, and he being only intrusted with it, the act would be elusory if he were not obliged to do diligence, since none else could do it, and he might easily inform himself, at least once a-year. It was also debated, That, by the above act, the clerk to the Notaries was obliged to understand sufficiently the office of Notary ; though it was answered, That he was no further obliged than to draw a bill for their admission. *Vide Mackenzie's observ. on the above act, and Stair's decisions, part 2. p. 759.*

The Notary then gets from the clerk to the admission one of these protocol-books ; and this protocol is marked by the clerk in several of the leaves, which will be better understood by inserting the following docket, which is

D

written

written in the middle of the last leaf by the clerk.

Edinburgh, June 1. 1739.

THIS protocol contains fourscore and ten leaves, whereof the first, last, and every tenth leaf is marked with my sign and subscription manual, and all the rest of the leaves with my name allenarly.

J. N.

The following act of admission was formerly not only inserted in the register kept by the clerk of the Notaries, but likewise inserted in the Notary's first protocol. At present it is only inserted in the register kept by the clerk, and the Notary gets a commission signed by the clerk, in which the long docket is also inserted; which commission, for a further illustration of this subject, I thought proper to insert: and, although the king's letters are not now used to pass his Majesty's own hand (as has been said, *p. 26.*), yet they pass the cachet, and are delivered to the Notary, which he keeps.

Apud Edinburgum, vigesimo die mensis Novembris, anno Domini millesimo septingentesimo trigesimo nono, regnique S. D. N. Regis anno decimo tertio.

THE which day, in presence of the Lords of Council and Session, compeared *A B*
writer

writer in Edinburgh, of the age of twenty-five years or thereby, and produced the presentation under written, whereof the tenor follows.

GEORGE *Rex.*

CHancellor, President, and remanent Lords of Council and Session, we greet you well. Forasmuch as we are informed of the literature, qualifications, and good education of our lovit *A B*, that he is able and qualified to use and exerce the office of a Notary-public to the lieges, if he were admitted thereto; herefore it is our will, and we charge you to take trial of his literature, qualifications, and good education, for using and exercising the said office of Notary; and, being found able and qualified, that ye admit him thereto, and authorise him, with your Lordships testimonial thereon, conform to the order used and observed in the like cases. Given at, &c.

Conform whereunto, the said *A B* desired to be admitted Notary-public, and, after trial taken of him by *H D* and *R D*, appointed to be Lords Examinators, they understanding him to be able and qualified, the Lords have admitted, and hereby admit him thereto; and he hath made faith, that he shall truly and legally administrate therein during the time of the said office; and likewise hath taken the oaths of allegiance, assurance, and abjuration,

conform to the laws; and shall observe the acts of parliament made anent Notaries. And for his observing and doing of justice in the said office of Notary, *ȝ D* writer to the signet hath become cautioner for him; and they bind and oblige them conjunctly and severally, their heirs, executors, successors, and intro-mitters with their goods and gear whatsoever, to refund to all parties, damnified by giving any instrument in time coming, such sums of money as the Lords shall be pleased to modify. And also the said *A B*, and his said cautioner, bind and oblige them and their forefaids, conjunctly and severally, as said is, that he shall insert in his protocol-book with his own hand, all instruments of seisin, resignation, and other instruments of consequence that shall be given under his sign and subscription manual, within fifteen days next after the giving thereof, under the pain of one hundred pounds Scots, in case he shall happen to contravene the premisses, and shall be punished by deprivation and other punishment, as the Lords shall think expedient. And sicklike, the said *A B*, and his said cautioner, bind and oblige them and their forefaids, conjunctly and severally, as said is, that the said *A B*, and his heirs and successors, havers of the said protocol-book, shall, within fifteen days next after his decease, (whenever the same shall happen), bring and deliver the said protocol-book to the clerk of admission of Notaries, and his successors in office, under the pain of
one

one hundred pounds money foresaid, conform to the act of parliament. And the said *AB* grants him to have received from *J N*, clerk to the admission of Notaries, an Protocol-book, containing the number of four score and ten leaves, all marked by the said *J N*, in manner following, *viz.* The first leaf and every tenth leaf with his sign and subscription manual, and the rest with his name allenarly. And the said *AB*, and his said cautioner, bind and oblige them and their foresaids, conjunctly and severally, as said is, that the said *AB* shall perfect the same to the final end thereof, with authentic instruments of the quality foresaid, if he be on life, and after perfecting thereof, shall produce a new book, to be marked by the said clerk to the admission of Notaries, or his successors in office. And sicklike, the said *AB*, and his said cautioner, bind and oblige them and their foresaids, conjunctly and severally, as said is, that the said *AB* shall not insert any instruments in any other book not marked by the clerk to the admission of Notaries, under the pain of one hundred pounds money foresaid, besides the losing the office of Notary ; which, upon any such failzie, (of inserting any such instruments in any other book not marked by the clerk to the admission of Notaries), shall *ipso facto* become void and null : and that he shall insert, in whatsoever bonds, contracts, or dispositions he shall happen to write, the clause of registration in the books of council and session, under

the pain of deprivation. And finally, the said *A B* binds and obliges him and his foresaids to relieve the said *J D* his cautioner, and his foresaids, of the hail premisses : and he and his cautioner are content and consent that letters of horning be direct hereupon, upon an simple charge of six days allenarly ; and the Lords have interponed their authority ; and the said *A B* hath subscribed hereto his sign and subscription manual, that he is to use at the end of all public instruments that are to be exped by him.

Here follows the docket, as in p. 44.

Copy of the commission presently given and subscribed, upon stamped paper, by the clerk, to all persons admitted Notaries.

At Edinburgh, the first day of November, one thousand seven hundred and thirty-nine years, and of his Majesty's reign the thirteenth year.

WHICH day *A B* being duly and lawfully presented to the Lords of Council and Session, is, after examination, found qualified, and thereupon admitted by their Lordships a Notary-public, with his Majesty's authority, to use and exerce the said office as fully and freely as any other does, or may do, within Scotland : and as he hath given his oath *de fidei administratione*, and received a protocol-book of ninety-one leaves, all duly marked by me the clerk

clerk hereto subscribing; so he hath found caution for the honest and faithful administration of his office, conform to law, under the pain of deprivation, and such other punishments as the said Lords shall inflict, and likewise of such fine to be paid by him and his said cautioner as the said Lords shall think fit, and to satisfy and pay to every person prejudged by his maladministration, such damages as the said Lords shall modify, under the penalty of *L. 100 Scots* money, over and above performance; as also to use the like sign and subscription manual, as is hereto annexed, in all instruments of seisin, resignation, and other instruments of importance which shall be given by him; and to insert in his protocol all such instruments of importance, within fifteen days after his subscribing thereof, under the like penalty for each failure, besides forfeiture of his office; as also, that how soon the protocol book now delivered him shall be completely filled up, that he shall, within fifteen days thereafter, produce a new book, to be marked by me the clerk, or my successors in office, and so successively, as a former book shall be finished, shall take a new one, marked as said is, under the penalty of *L. 100 Scots* for each failure; as also, that under the like penalty he shall make patent his protocols, to be inspected by me and my successors, as oft as desired; and that his heirs and executors, within fifteen days after his death, shall bring and deliver all his protocol-books to me, and my successors; and also,

also, that in all bonds, contracts, and dispositions to be wrote by him, he shall insert a clause for registration thereof in the books of council and session, under the like penalty of *L. 100 Scots*, in case of failure. Extracted upon paper first duly stamped, from the records of the admission of Notaries, by me Mr *J Clerk* thereto, this first day of November, one thousand seven hundred and thirty-nine years.

J. N.

Follows the sign and subscription manual, to be used by the said A B in all instruments of importance.

+++++ Et ego vero
 † Qui vult finem, dat et media. † A B, Clericus
 † +++++ Sancti Andrea
 † A B N. P. † diæceseos, ac
 † +++++ Notarius publi-
 cus autoritate regali, ac per Dominos Concilii et
 Sessionis secundum tenorem aëti parliamenti admis-
 sus: Quia præmissis omnibus et singulis, dum sic ut
 præmittitur, dicerentur, agerentur, et fierent, una
 cum prænominatis testibus præsens personaliter inter-
 fui; eaque omnia et singula præmissa sic fieri vidi,
 scribi, et audiri, ac in notam cepi: ideoque hoc præ-
 sens publicum instrumentum (manu mea fideliter scri-
 ptum) exinde confeci, ac in hanc publici instrumen-
 ti formam redegi, signoque, nomine, et cogno-
 mine meis solitis et consuetis, signavi et sub-
 scripsi, in fidem, robur, et testimonium veritatis o-
 mnium

mnium et singulorum præmissorum rogatus et requisitus.
A B. N. P.

The above docket is also written at the end of the act of admission, in the clerk's register, in a column towards the right hand, and towards the left is written the Notary's sign and subscription manual, and at the foot the cautioner subscribes, and again the Notary for his relief. And further, this docket is used by the Notary in all instruments of moment; and for instruments of lesser moment he has another short one, which is not made up of a number of fixed and unalterable words, like the attestation subjoined to instruments of higher importance, but is such as the Notary also assumes to himself at his admission. One or two of which I have thought proper to subjoin, and shall not repeat them hereafter; as, *Quod vidi assero. — Quæ attestor. — Præmissa esse vera, ego A B Notarius publicus requisitus, attestor: Or, Ita esse ut præmittitur, ego A B N. P. rogatus, attestor; and the like.*

Besides these dockets there are two or three more composed of a certain form of words suitable to the business or paper they are applied to; and that either in attesting doubles of original papers, or subscribing for persons who cannot write. The docket adjoined to copies of writs will run thus.

“ What is above [or before] written, is a
 “ true, full, and exact copy of the original, &c.
 “ [here take in the name of the paper] made and
 “ granted

“ granted by *A* to *B*, of the date, tenor, and
 “ contents particularly above [*or before*] writ-
 “ ten, without addition, diminution, or altera-
 “ tion whatsoever; being duly collationed and
 “ compared by us Notaries-public, at, &c.
 “ before these witnesses, &c.”

The same in Latin.

Quod est supra [vel antea] scriptum, est vera,
plena, et exacta copia originalis, &c. factæ et con-
*cessæ per *A*, ad et in favorem *B*, de data, tenore,*
et contentis particulariter supra [vel antea] scriptis,
absque additione, diminutione, et variatione aliqua-
li, debite collationatæ et comparatæ per nos Notari-
os publicos subscribentes, apud — die mensis —
anno Domini millesimo septingentesimo trigesimo no-
no, coram his testibus, &c.

Another form of the same.

“ I *A*, Notary-public under-subscribing, do
 “ hereby testify, that this present copy above
 “ written, taken from the original instrument
 “ or contract, &c. of the date and tenor at
 “ length above written, being diligently
 “ hearkened, seen, and read by me; and be-
 “ cause in all things, and by all things, I found
 “ it to agree *verbatim* with the principal and
 “ original above specified; and that it is nei-
 “ ther rased nor cancelled in any part there-
 “ of; therefore I, together with another No-
 “ tary-public, have subscribed the same, te-
 “ stifying

“stifying this by our sign and subscription
“manual, at — before — witnesses spe-
“cially called and required to the premif-
“ses.”

“So it is, I *D*, Notary-public, and co-notary
“in the premisses, specially called and requi-
“red, do testify the truth of the above-named
“copy, in all things, and by all things, as a-
“bove set down, by this my sign and subscrip-
“tion manual.”

The docket adjected to writs when persons cannot write, will run thus :

De speciali mandato dicti A (a), calamum tangentis, scribereque nescientis (b), ut asseruit, ego B Notarius publicus pro eo subscribo.

If a Notary shall accept a bill of exchange for one who cannot write, the docket may run thus :

De speciali mandato dicti A, calamum tangentis, scribereque nescientis, ut asseruit, ego B Notarius publicus acceptationem billæ cambii superscriptæ pro eo subscribo, apud — die mensis — anno Domini —, coram his testibus —, ad præmissa vocatis et requisitis.

The co-notary's docket :

Et similiter, de speciali mandato, &c. ego C

(a) If the person be unknown to the Notary, add, *non mihi, sed dictis testibus noti, prout ipsi asseruerunt.*

(b) If the person could write, but by some disease or temporal impediment, is hindered, add here, *ob agnitudinem, podagram, paralyfin, vulnus, &c. as the fact is.*

Notarius

Notarius publicus, et co-notarius publicus in premissis, acceptationem, &c. data, loco, et coram testibus superscriptis.

The Notary being thus furnished with all things necessary, may practise over all Scotland, in all honest and lawful business relative to his office ; which may be reduced to the following heads.

1. The giving, forming, and extending of instruments when required by parties. 2. The giving and extending of notorial copies of papers. 3. The subscribing of writs and securities for and at the request of persons who either cannot write themselves, or who can write, but by reason of some sickness or indisposition, or other temporal impediment, are at the present time incapable. Which shall be discoursed of in their proper places.

+++++

P A R T II.

Of Notorial Instruments of all kinds.

T I T L E I.

Of Instruments in general.

IN the former part of this treatise I have given a short account of the different kinds of Notaries, and the way presently used

used of admitting such as incline to practise that employment in this kingdom : in the next place, I come to narrate the several kinds of instruments that are commonly now in use, as well for the completing, as those requisite and necessary for the extinction of heritable rights ; in doing of which I shall endeavour, as much as possible, to illustrate the instruments, so as that one may be enabled to extend, form, and draw up any instrument whatever.

An instrument may be defined, *A solemn and duly-regulated deed or writing, made and given under the hand of a Notary-public, as a proof and evidence of what is legally done, and formally therein represented.*

The requisites of all instruments, as well as every other law-writing, consist in its being agreeable to law, and such as is in common use ; its being certain either in itself, or relatively, with respect to another writing mentioned in it, and to which it refers, and by which it can be made certain and determined, and from which may appear what it contains : for it is equipollent in law, not to be, and not to appear ; and an instrument that is doubtful, uncertain, or general, makes no faith.

In its form, it must be perfect, *i. e.* have all the usual clauses of style, and other solemnities ; it must not be ras'd or scraped with a knife, or vitiated in any part of it, which will mar and keep it from being probative :

for every writing is individuouſ, *i. e.* it muſt be admitted wholly or rejected wholly, except it conſiſt of divers articles of ſeparate matter, ſo as, one of them do not relate to the other, and may ſubſiſt by itſelf ; but this is doubtful, and depends on circumſtances *in arbitrio judicis*.

The mind and deſign of parties ſhould be diſtinctly ſet down, and expreſſed in words not vitious in orthography or grammar, and the ſentences well conceived, that the writing be effectual and obligatory : for the words ſet down are to be judged not to be idle, but operative.

The ſettled order and tenor commonly made uſe of in that kind of writing, and eſta bliſhed by immemorial cuſtom of ſtyle, is to be obſerved.

Of this order in general there are three parts : 1. The beginning, from which the minds of the contractors may be gathered. 2. The middle, which is regulated by the extremes, *i. e.* the antecedents and conſequents. 3. The end or concluſion.

The requiſite ſolemnities in all inſtruments, by the civil law, were theſe following : The year of the emperor's reign ; the name of the preſent conſul ; the number of the indiction ; the month, and day of the month on which the inſtrument was made, *Novel. 47. cap. 1. in pr. § 1.* the witneſſes names and designations preſent, *Novel. 73. cap. 1. & 2.* and ſee *Wefenb. ad Pand. de fide*

fide instr. n. 5. the name of the Notary: and to all which the Emperor Maximilian, in his constitution concerning Notaries, made in the year 1512, § 1. ordered, that the name of God should be invocated in the beginning of all instruments.

In this kingdom instruments of moment are completed by the solemnities following: 1. The invocation. 2. The year of our Lord. 3. The month. 4. The particular day of the month. 5. The year of our Sovereign's reign. 6. The presence of the Notary and witnesses. 7. The compareance of the party, or his procurator. 8. The substantial part of the instrument. 9. The requiring instruments from the Notary by the parties concerned upon what was done. 10. The place where, and the particular hour of the day in which the instrument was taken. 11. The names and designations of the witnesses present. *Lastly*, The Notary's docket. All which will be clearer by the following example.

I*N nomine Domini (a) nostri Jhesu Christi, Amen. Per hoc præsens publicum instrumentum cunctis pateat evidenter et sit notum, quod anno incarnationis Domini millesimo septingentesimo trigesimo nono, mensis vero Decembris die vigesima*

(a) Vel, *In Dei nomine, Amen. Vel, In nomine Patris, Filii, et Spiritus Sancti, Amen.*

prima, regnique S. D. N. (a) Georgii Secundi, Dei gratia, Magnæ Britanniae, Franciæ, et Hiberniæ Regis, fideique defensoris, anno decimo tertio, in mei Notarii publici testiumque subscribentium (a) præsentia personaliter comparuit A, [hoc loco instrumenti pars substantialis inseritur, et deinde subsequuntur hæc verba], de et super quibus omnibus et singulis dictus A, a me Notario publico subscribente, sibi fieri petiit unum vel plura instrumentum seu instrumenta, publicum seu publica. Acta erant hæc Edinburgi, in domo B mercatoris ibidem, in clausura vulgo vocata — et in inferiore camera ejusdem, horas inter — et — ante [vel post] meridiem, die, mense, anno Domini regnique Regis superscriptis, præsentibus ibidem probis viris C et D testibus ad præmissa vocatis pariterque rogatis et requisitis. [Deinde subsequitur signum cum sigillo Notarii.]

The same in English.

IN the name of God, Amen. Be it known to all men by this present public instrument, that upon the twenty-first day of December, One thousand seven hundred and

(a) By these letters *S. D. N.* is to be understood *Serenissimi Domini nostri* : and I find that the Roman emperors, in all public instruments, were called *Sacratissimi*.

(b) In old style, it was *subscriptorum*, but since the act of parliament 1681, all witnesses must sign instruments of importance, (as shall be noticed hereafter) ; and therefore, since that act, this word is changed from *subscriptorum* to *subscribentium*.

thirty-

thirty-nine years, and of the reign of our Sovereign Lord George the Second, by the grace of God, King of Great Britain, France, and Ireland, defender of the faith, the thirteenth year, in presence of me Notary-public, and witnesses subscribing, compeared personally A, [*here insert the substantial part of the instrument, and then the formal, as follows*] ; whereupon all and sundry the premisses the said A asked, required, and took instruments, one or more, from me Notary-public. These things were done at Edinburgh, in the house of B merchant there, in ——— close, and in the lower room thereof, betwixt the hours of — and — before [*or after*] noon, before, and in presence of C and D, witnesses to the hail premisses specially called and required, &c.

As to the place where the instrument was made, it is to be remarked that it is twofold : 1. The place in general, as that of a city, village, mansion-house, &c. and, 2. What the lawyers term *locus loci*, or the special house, or particular room of that house, as in the above instrument ; as to which, if the business require the *locus loci* to be mentioned, then the instrument must bear it. *Vid. Author. Artis Notariat. p. 304.*

The words *asked and required* are so necessary in all instruments of importance, both with respect to the Notary and witnesses, that Craig, *lib. 2. dieg. 7.* tells us, that the omission thereof with respect to the Notary, will vitiate the

instrument; and further adds, that the difference betwixt the Notary's being asked and required, and the witnesses, is, that the requisition of the Notary is always to be expressed, but that of the witnesses may be sometimes presumed.

Of old, the inserting and designing of witnesses was sufficient, although they did not subscribe; but by *act 5. parl. 3.* Charles II. all writs are declared null and improbative, except the witnesses subscribe; and the act particularly mentions, that witnesses must subscribe *all instruments of seisin, resignations ad remanentiam, and instruments of intimation of assignments, translations, or retrocessions to bonds, &c.* From this statute it is fit to observe, although other instruments taken by Notaries, not mentioned in this act, continue in their former condition, and need no subscribing witnesses; nevertheless it is more secure, that witnesses subscribe all kinds of instruments, which will the better fix in their memory what they sign: for which end every Notary ought to be cautious to have present with him, at all his instruments, honest and faithful witnesses, not liable to any exception, and always such a number of them as are requisite and necessary for the particular business to which they are called; and the more the better; but at the least two. *Vide infra, tit. 8.*

Instruments of less moment do not require so many solemnities; and the invocation is generally omitted; and, for most part, they begin

gin with the place, day of the month, and particular name thereof, the year of God, and of the king or queen's reign, in the following manner :

Apud Edinburgum, vigesima prima die mensis Decembris, anno Domini millesimo septingentesimo trigesimo nono, S. D. N. regis anno decimo tertio. Qua die, in mei Notarii publici et testium, &c.
Or thus in English: " At Edinburgh, the
" twenty-first day of December, one thousand
" seven hundred and thirty-nine years, and of
" his Majesty's reign the thirteenth year. The
" which day, in presence of me Notary-public,
" &c."

There are, in most part of instruments, three persons necessary, besides the witnesses, as in seifins, intimations, requisitions, &c.

For the completing of seifins, the presence of the superior or his bailie, the vassal or his attorney, and the Notary, are requisite ; for intimations, the person intimator, the person to whom intimate, and the Notary ; for requisitions, the person requiring, the person from whom required, and the Notary.

As a Notary is a sort of judge, (the civilians; as has been already observed, call him a *chartulary one*), exercising voluntary jurisdiction, he can do nothing but at the desire, and by the order of parties, or their procurators ; therefore he cannot be Notary and witness to his own deed, as was found in the case *Leckie contra Cuningham*, 20th November 1627, observed by Durie ; nor can he be both pro-
curator

curator and Notary, Mackenzie's Institutions, *book 3. tit. 5. § 3.* and Scot *contra* Drumlanric, July 3. 1628, observed by Durie : nevertheless, according to foreign custom, and for the facilitating of commerce, it is ordinary for Notaries in this kingdom to protest bills at the desire of merchants, without any procurator.

* When one is authorised and empowered by another to appear in any business as his procurator or attorney, it ought to be done by a writ under the party's hand ; and although the constituent's papers are frequently holden as sufficient, yet the Notary ought to be conscious of this mandate to the procurator : however, in requisitions this does not hold ; for an instrument of requisition was found null, because it did not bear a procuratory produced the time of the requisition : and, although another instrument was produced, extended by the same Notary, bearing a procuratory produced, the Lords refused to admit the same, after the judicial offer of the first (the case not being betwixt the wadsetter and reverser, but betwixt a creditor and donatar) ; although it was pled in support of the first instrument, That the Lords had, in many cases, sustained requisitions or premonitions by procurators, without mention either of the production or reading thereof, when an anterior procuratory is produced in process, and when the procuratory was not called for, 12th January 1677, the creditors of Wamphray *contra* the Laird of Calderhall, observed by Stair.

Likewise

Likewise the party authoris'd as procurator, should not only have a procuratory, but it is also incumbent on him to deliver his procuratory to the Notary, to the effect the Notary may read the same to the party, although the person to whom intimation is made should neither desire nor require to see the procuratory; for the Notary's reading thereof, without the procurator's order and direction, is not an act of his office, nor does it belong to him to be Notary to his own deed, but in so far as he has the preceding warrant of the requirer: wherefore it is necessary for the procurator to desire the Notary to read the same; upon which he ought to do it, and give instruments thereon. Nor will a probation by witnesses, that the procuratory was produced, be admitted; because such solemnities are not presumed, and cannot be proven by witnesses, but by valid and formal instruments, *Dirleton, p. 211.*

Requisitions made to minors must also be made to their tutors and curators personally, or at the market-cross by letters of supplement; and although an instrument of requisition bear that it was made at the market-cross to tutors and curators, yet without these letters it will be null, as was found 15th June 1680, *Gordon contra Earl of Queensberry*, observed by Stair. But requisitions made to minors by their superiors, to come to treat and confer upon a purpose of marriage, or the like, needs not be made to

to their tutors and curators, but is sufficient if made to the minors themselves ; because the consent of tutors and curators is not requisite to the minor's marriage, and so they need not be required ; as was found 3d July 1622, French *contra* L. Thornidykes, observed by Durie.

Although what in the first part has been said anent the Notary's protocol, may be thought sufficient ; yet, by the following decision, Notaries will observe how cautious they ought to be in making out and signing the minute of any business, or inserting it in their protocol ; lest, by any unforeseen accident, they, by their negligence or omission, may render the whole business abortive, and thereby subject the party-employer to a great deal of fruitless charges and expenses. The case was thus : A requisition from a debtor being made in presence of witnesses, and an instrument thereon required from a Notary, who wrote with his own hand a minute, but deceased while an instrument was to have been extended ; the requirer pursued the debtor for extending and making up the instrument ; and craved, that he (the debtor) and the witnesses might be examined ; and that, upon probation that the requisition had been made conform to the said minute, an instrument under the clerk-register's hand should be equivalent to one which the deceased Notary might have signed. The Lords refused the said desire, in respect the said minute was neither

ther subscribed by the Notary, nor in his protocol. And Dirleton in this decision, *decis.* 102. adds, That requisition, or such *actus legitimi*, cannot be proven but by instruments perfected as to all necessary solemnities, at least the minutes of the same under the Notary's hand. And though the debtor, or party concerned, may know that such deeds were done *de facto*; they may be ignorant, and are not obliged to declare whether they were legally done or not.

As to the particular sort of paper or material on which instruments of consequence are to be writ, the constitution of the Emperor Maximilian, mentioned above, ordains all notorial instruments to be written on parchment; but Gail, in his *pract. obs. lib. 1. obs.* 119. n. 3. adds an exception, Unless by custom it be otherwise; because (saith he) such customs are allowed of in the sovereign court of the empire, called the *Imperial chamber*, notwithstanding of that constitution.

Formerly in Scotland instruments of importance, such as seifins, &c. were either written on parchment or paper; for there never was a legal necessity to write them on either, until that by an act of the British parliament, the 10th year of Queen Anne, it is statute, that *all instruments of resignation of any heritable right, as of houses, lands, tithes, mills, fishings, &c. all charters of resignation, confirmation, Novo damus, or adjudication, retours of any service of heirs. precepts of Clare constat, and seifins of all kinds,*
 &c.

&c. shall be written on stamped vellum, under the pain of nullity. On all which skins, whereupon the said evidents are ingrossed, there is a duty of 2 s. 3 d. Sterling, besides the price of the vellum, paid to the collector of the stamp-duties ; and this duty is to continue for the space of 32 years, from and after the 10th of June 1712 : and all writings, rights, and obligations aforesaid, written on vellum and not stamped, shall not be available in law or equity, unless L. 5 Sterling, together with the above duty for every such writing, be paid.

There are in Scotland various kinds of instruments made use of ; some of which are requisite and necessary for completing or extinguishing heritable rights : to the first of which, instruments of seisin and resignation relate ; to the latter, instruments of premonition, consignation, requisition, and attendance. To the completing of personal rights relate instruments of possession, intimation of personal obligations, and instruments requiring persons to do, pay, or perform somewhat, or somewhat to be done by the taker of the instrument ; as requiring sums due by bills or bonds, where there is a clause whereby the creditor is obliged to require his money ; or instruments that a debtor is to consign a sum due by bond, if the creditor refuse to accept of the sum ; amidst a number of others, as you will see by the sequel.

T I T L E

T I T L E II.

Of Instruments of Seisin.

A Formal feisin (as defined by my Lord Stair) is, *The instrument of a Notary-public, bearing the delivery of symbolical possession by the superior or his bailie, to the vassal or his attorney, by delivery of earth and stone, and other symbols accustomed, upon the ground of the fee.*

Before the reign of King James I. the form of tradition of lands and houses, &c. was very uncertain. Some were of opinion, that possession could be given by the superior by staff and baston, at any place, and even not upon the ground of the lands; others, that the delivery of the keys was sufficient; and others thought, that possession could only be given in the superior's court; and there were some who were of opinion, that it might be given before the other vassals, although not in the court.

Craig, *lib. 2. dieg. 7.* tells us, the old form was, that the seller of lands or houses went out of the door, and the buyer entered; so that the opening and closing of the door was a perfect feisin: that thereafter, tradition or feisin was given by delivery of a penny to the bailie: and adds, that long thereafter, even near to his time, the bailie's seal upon the superior's disposition, charter, or precept, was

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sufficient

sufficient to instruct delivery of possession. Therefore, till the time of the said king, any charter, disposition, or precept, from a superior to a vassal, mentioning his heirs; or an heritable right, with true and real possession, without simulation, was sufficient to complete the fee.

Neither was there necessity in any case to prove the delivery, or the superior's entering the vassal in possession; but that was presumed from the possession itself: and therefore it needed not be debated how the vassal entered into possession, or what warrant the bailie had to give him possession; or what warrant the person had as procurator or attorney for the vassal who received the possession for him; for, if the vassal was in the natural and civil possession, all these powers were presumed.

But the name of *Attorney* (which is but seldom used with us, except in cases of seisin), together with the solemnities of seisins by the instrument of a Notary, was first introduced by the same K. James, about the year 1430, he having brought them from England, (where he had been long captive), and the English from France, as Craig in the above-cited place relates.

By all which it appears, that at this time it would be of no effect to make a real right, without the attest of a Notary. In which sense the vulgar maxim is to be understood, *Nulla sasina, nulla terra*; which is not only necessary to the first vassal, but must be re-
newed

newed to all his heirs and successors : and therefore every heir must be infeft in fees ; otherwise, if they die uninfeft, they never attain the real right, but a possessory title to the fruits and rents ; which will belong to their executors, in so far as unuplifted, from their predecessor's death, till their own death, or renunciation to be heir ; and will be affected for their proper debts ; which will not affect the heritage, or the next heir entering, who must enter to the decunct who died last infeft, and will be liable for his debts ; but not for those of his apparent heir, who was never infeft : for the property or dominion of lands, or other subjects acquired by disposition, permutation, or any other singular title, is never understood, in the construction of law, to be thoroughly invested in the person of the acquirer, but, on the contrary, deemed to remain with his author until he has perfected his right by seisin.

Seisin, when no latency or fraud can be qualified, may be taken at any time upon a lawful day ; for a seisin, although it bore to have been taken *circiter horam nonam post meridiem*, was found valid, 19th November 1679, Arnot *contra* Turner, observed by Stair.

When lands lie contiguously, one seisin serves for all, unless they be held by different superiors, or by different tenures ; and in either of these cases the contiguity does not save the trouble of taking different seisins : but if the lands be dispersed into distant places, or

if the tenements are of diverse kinds, every distinct parcel, or particular tenement, requires a special seisin, unless they be united into a barony : for, according to Craig, *lib. 2. dieg. 7. Quot sunt fundi discontigui, nec in charta uniti, totidem seisinæ debent intervenire, uti plenum transferatur dominium.*

But, if they are either erected into the dignity of a barony, or united together in one tenement, one seisin at the place appointed by the union, or upon any part of the united lands, if no such place is mentioned, becomes sufficient for the whole. As to the advantages belonging to this union, see Craig in the above-cited place.

It hath been already told at what time seisin were introduced into this kingdom ; yet from the narrative of the 16th *act, parl. 22. Ja. VI.* we may observe, that notwithstanding this way of transmission of property, by the attest of a Notary, was clearer and more secure for purchasers, than any formerly used ; nevertheless, until the erecting of the public registers, which by this act are enjoined, purchasers were very unsecure, as from the act itself it appears ; for it sets forth, *That our Sovereign Lord considering the great hurt sustained by his Majesty's lieges, by the fraudulent dealing of parties, who having annailzied their lands, and received great sums of money therefore ; yet by their unjust concealing of some private right formerly made by them, render the subsequent alienation, done for great sums of money, altogether unprofitable ;*

able; which cannot be avoided, unless the said private rights be made public and patent to his Highness's lieges: for remedy thereof, and of many inconveniencies which may ensue thereupon, his Majesty, with advice and consent of the estates of parliament, statutes and ordains, That there shall be a public register, in the which all reversions, regresses, bonds and writs for making of reversions or regresses, assignments thereto, discharges of the same, renunciations of wadsets, and grants of redemption, and sicklike all instruments of seisin, shall be registrate within sixty days after the date of the same, &c. But this act is not extended to seifins and reversions within burgh, nor to reversions incorporated in the body of the infestments. And likewise, the act ordains the clerk to register these different evidents within the space of forty-eight hours next after the receipt thereof, and to ingross the whole body of the writ in the register, under the pain of deprivation; and within the same space to deliver to the presenter of the same their evidents marked by him, with the day, month, and year of the registration, and in what leaf of the book the same is registrate. And all these securities are to be registrate either in the general register kept at Edinburgh, or in the particular register of every shire, kept at the several places named in this act. Sir George Mackenzie, in his observations on this part of the act, states a question, Whether, when lands lie within different shires, but are united; if in

that case they are to be registrate in the shire where the place lies, at which the seisin is to be taken by the charter of union, or at all the places where the lands lie? But I would think, for shunning any inconveniency of this nature, the registration of such seisins in the general register at Edinburgh would be sufficient. However, I submit this to people of better judgment, especially seeing that by a decision, 12th June 1673, *Faa contra* Laird of Pourie, observed by Stair, where this question occasionally occurred in the debate, the Lords left it undetermined. Sir George further adds, That since this act of parliament requires, that all seisins, renunciations of wadsets, &c. shall be registrate, I think (says he) the booking of them is necessary. Nor is it sufficient (as some pretend) that they are produced and marked by the clerk; because (as they say) the lieges can do no more, and they ought not to be punished for the clerk's negligence: for if this were sufficient, no singular successor could be secure; and the producer may pursue the clerk if he book them not, since the act of parliament requires actual registration.

My Lord Stair, although he speaks nothing of a pursuit of this nature, nevertheless in his *Instit. lib. 2. tit. 2. § 22.* states the question thus: *If the keeper of the register of seisins do, according to the custom, mark the seisin registrate, and attest the same by his subscription, and yet, by negligence or fraud, shall not insert it in the register; whether*

ther in that case a purchaser bona fide, for causes onerous, though infest thereafter, will be excluded by that prior infestment marked by the clerk, and not recorded? Though nothing has been observed in this case, yet if seisins marked registrate, though not found in the register, were found sufficient against singular successors purchasing thereafter, the design and tenor of this statute would be eluded; for the statute bears, "If they be not registrate, (which wust import their being inserted in the register), they are null." And therefore, though the keeper of the register hath attested such seisins to be registrate, yet truly they are not registrate; and no purchaser could be secure by inspection of registers, if a false attest of a clerk could exclude him, who oft-times is insolvent.

Notwithstanding what is said by these two great lawyers, the parliament 1686, act 19. statuted, That when a writ to be registrate bears on the back, That it was presented, and registrate, it be a sufficient security, albeit it be not found in the register; but that keepers of registers omitting or negligent, be punished as forgers of public registers, and liable to the party's damage. But by act 18. parl. 1. sess. 6. K. William, the first part of this act is rescinded, and it is declared, That no seisin, or other writ to be registrated, be of force against any person save the granter, unless it be duly booked and inserted in the register; but the rest of the above act is ratified, and the heirs of negligent keepers made liable

liable for damages, though no action was raised in the keeper's lifetime,

The thirty-second article in the *act of regulations, parl. 1672*, "appointing the keepers
 " of registers to have minute-books, and that
 " the same be quarterly collationed with the
 " registers, by the sheriffs and bailies where
 " the registers are kept, and two justices of
 " peace, under the pain of *L. 100 toties quoties*
 " they neglect to collation, and deprivation of the keepers, and paying damage
 " to parties in case they fail in their duty,
 " &c." having fallen in desuetude : therefore the Lords, by their act of sederunt, 15th
 July 1692, ordained, " That all keepers of
 " registers should keep minute-books of their
 " several registers ; and that immediately upon
 " presenting any writs to be registrate therein,
 " they should set down the name and designation of the person presenting, and the day
 " and hour when he presented the same, expressing the general designation of the lands,
 " or other rights ; and that the minute of each
 " writ presented should be signed by the presenter, and by the keeper ; and that the keeper
 " should insert the writs presented, in the
 " same order as they are in the minute-book,
 " under the pain of deprivation and damages,
 " conform to the said act of regulations."

And by *act 14. parl. 1. sess. 4.* William and Mary, this act of sederunt is ratified, and passed into an act of parliament ; which doth fully complete the design of the acts for registration

tion of seifins, reverfions, allowances of appri-
fings and adjudications, hornings, inhibitions,
and interdictions: all which may affect lands,
not only againft the granters and their heirs,
but even may militate againft fingular fuc-
ceffors. And it is not poffible for the keep-
ers of the registers to alter thefe minute-
books, in refpect the minute of each right is
figned by the prefenter thereof. Which mi-
nute-book, by the above-cited act of parlia-
ment, is to be made patent to all the lieges
gratis; which, in fo far, may feem an altera-
tion of the *act of regulations*, which grants an
allowance in money for infpection of the regi-
fter: but yet this is only making free the in-
fpection of the minute-book. It is generally
thought, that the fixty days within which fei-
fins are to be regiftrate, are fo to be counted
only, that either the day upon which the writs
are dated, or the day upon which they are regi-
ftrate, muft be free.

Notwithstanding what has been faid, this
neceffity of regiftration is only introduced in
favour of fingular fucceffors acquiring pofte-
rior rights; and therefore the nullity of not
regiftration was not fufained at the instance of
one who had no ftanding right in his perfon,
21ft July 1638, Rowan *contra* Colvin, obfer-
ved by Durie. Nor will this nullity be fuf-
tained in favour of the difponer or his heirs;
for *quoad* them thefe rights are valid without
regiftration: nor was the not regiftration of
a feifin found invalid at the instance of a fon,
who

who got the estate disposed to him by his father, with power to the father to burden it with a sum, since this son was found to be no third party, 27th February 1667, Countess of Carnwath *contra* Earl of Carnwath, observed by Stair.

By act of sederunt, 5th June 1661, we learn, that, during Cromwell's usurpation, the forming and writing of securities in Latin was discharged : for that part of the act which restores the old form runs thus : *And also considering, that, during the power of the late usurpers, the use and custom of writing in Latin was then discharged by the pretended commissioners for administration of justice ; therefore the said Lords ordain all charters, seifins, and other writs of that nature, as well such as pass the seals as otherwise, which were in use to be formed and written in Latin, to be continued in the same language as formerly, before the year 1652.*

All instruments of seifin in decency ought to be extended in the same language with their warrant, it being unseemly to see Latin and English intermixed in the same writ.

Instruments of seifin proceed either upon precepts of seifin, commonly called *a precept of Clare constat*, or upon precepts of seifin contained in charters, dispositions, contracts, either of feu, wadset, or marriage, or on heritable bonds, or upon precepts forth of the chancery, upon retours directed to the sheriff-principal or his deputies ; which, by *acts* 77. *parl.* 6. James V. and 15. *parl.* 18. James VI. must

must be given by the sheriff-clerk as Notary : and he is not designed *Clericus diocesæ*, but *Clericus vicecomitatus*. It is further to be noticed, that this last-cited *act* 15. *parl.* 18. Ja. VI. narrates, that the above *act* 77. appoints such seisins to be taken by sheriffs and their clerks ; yet there is no mention made here of sheriffs, but only of sheriff-clerks : and yet the Lords of Session do now find seisins null *ope exceptionis*, unless they be given both by sheriffs as bailies, and sheriff-clerks as Notaries.

The reason why seisins upon retours must be given by the sheriffs, is, because some casualty belongs to the king out of the lands, conform to these precepts, for which ordinarily the sheriff takes security when he gives seisin : and at the delivery of the precept, there is a note made by the director of the chancery in the responde-book, bearing the sums for which the sheriff is to take security ; and he is to be charged, and counts therefore yearly in exchequer. See *act* 96. *parl.* 7. James V. *act* 64. *parl.* 11. and *act* 124. *parl.* 12. James VI. And there likewise belongs to the sheriff himself a casualty called a *seisin ox*.

When one is to consider if instruments of seisin be of a good style and form, containing all clauses necessary, let him know that,

1. All such instruments, having the common style, must in the beginning have the date, which must be a lawful one ; the name
of

of the month, the year of God, and of the king or queen's reign.

2. That in the presence of the Notary and witnesses, upon the lands particularly after mentioned, compeared personally the party himself, or his attorney, whose power was known to the Notary, holding in his hand the warrant of this seisin, which is either a contract or disposition, containing the precept of such a date, betwixt such and such parties; and then insert the obligation to infest (*verbatim* as in the warrant) in such lands (*verbatim* as in the dispositive clause.)

3. That this attorney presented the contract or disposition containing the precept of seisin, to the bailie constitute, thereby requesting him to execute his office.

4. That the bailie was willing so to do, and, accepting, delivered the warrant to the Notary-public to be published to the witnesses.

5. That the Notary-public read the same accordingly, and inserts in the instrument the precept *verbatim*. It is to be remembered, that if this precept be in the middle of a writ, you pass over all the other clauses, until *In witness whereof*, and then go on to the end thereof, subjoining the subscriptions.

6. That after so reading of the precept, the bailie delivered to the party, or his attorney, state and seisin of the lands, (which are here to be particularly narrated), and that by deliverance of the symbols of earth and stone,
Ec.

&c. to the attorney, at the place appointed by the precept; then specify how the lands are to be holden.

7. That the attorney asked instruments of the Notary-public; then the common style of the end of all seisions, which must bear the hour of the day.

Lastly, The attestation of the Notary, and his sign, and the subscription of four witnesses.

In order to illustrate this matter, and to make it the more plain to all Notaries, I shall follow out the several clauses of the above particulars, first inserting them as given by that great lawyer, my Lord Stair, in his *Institutes*, lib. 2. tit. 2.

1. It must bear the name of God, as its initial words.

2. The date by the day, month, and year of God, together with the name of the king, and the year of his reign.

3. The appearance of the vassal, or his certain attorney, with the superior's bailie, in presence of the Notary and witnesses, upon the ground of the land, &c. disposed, having in his hand the warrant of the seisin.

4. The delivery of the precept of seisin to the superior if he be present, or, in his absence, to his bailie; whose warrant is secured, because there is a blank left in the precept for his name; in which blank, any person's name being filled up, is sufficiently authorised as bailie in that part specially constitute.

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5. It

5. It bears the bailie's accepting of the precept, and delivering it to the Notary in presence of the witnesses.

6. The Notary's reading of the precept, and expounding it, if it be in Latin; and then the words of the precept must be ingrossed.

7. The superior or his bailie's delivering of earth and stone of the land, to the vassal or his attorney, bearer of the precept, or delivery of any other accustomed symbol, &c.

8. The attorney's requiring instruments.

9. It must bear, that these things were done upon the ground of the land, or other hereditament, and the hour of the day, before two witnesses at the least required thereto; which witnesses must now subscribe with the Notary, by act of parliament 1681.

Lastly, The attest of the Notary, bearing the authority of his creation; and that he was present with the witnesses, saying, *Vidi, scivi, et audiivi*; that the things contained in the instrument were so done as is expressed therein; and that he took a note thereof, and thereupon drew a formal instrument, and inserted the same in his protocol; whereunto are adjoined his sign, his motto, contained in his commission, relating to his faithfulness and trust; and his name, or the initial letters thereof, as at the end of his act of admission.

The first two of these solemnities you have in the foregoing title upon instruments in general; the others take as follows. When the
seisin

seisin is given and taken by the superior's bailie and the vassal's attorney, it will be the same as in the forecited title to the words *personaliter comparuit*; and then say, *discretus vel generosus vir A de —*, (a) *tanquam attornatus et procurator pro et in nomine B de —*, (b) *cujus attornati potestas mihi Notario publico subscribenti*

(a) But if the vassal be present with the superior's bailie, the form will be thus: *cui et in cuius favorem charta, dispositio, hereditaria obligatio, vel aliud scriptum postea mentionandum, fuit factum et concessum*,

(b) Formerly purchasers were put to great expenses, in regard that if either the disposer or purchaser died before resignation was made, or before seisin was taken upon the precept, the procuratory and precept were esteemed to become void, as being mandates failing with the mandant or mandatar: and, in case the disposer or purchaser happened to die, there was necessity for a process against the representatives of the disposer, to enter to the fee, (by being served heir therein, and infest thereupon); and to renew procuratories or precepts to the purchasers, their heirs or assignees. For remeid whereof, by *act 35. parl. 1693*, it is statute, That precepts of seisin formerly granted, or to be granted hereafter, shall be sufficient warrants for taking seisins, not only in favour of the party to whom granted, but also in favour of his heir served in general, or of his assignee by disposition and assignation, or by adjudication, as well after as before the death of the granter or receiver, or both, provided the instrument of seisin taken after the death of the receiver express and therein deduce the right of the person to whom seisin is given; otherwise to be null. But from this act, precepts of *Clare constat* are excepted; because, by keeping up these, the casualties due to the superior might be shunned. Wherefore, if the seisin be given to the attorney of the heir of the person in whose favour the right was granted, upon which no infestment followed,

subscribenti lucide constabat; qui, cum discreto etiam viro D de ———, balivo per fasina, præceptum subscriptum (a) specialiter constituto, ad (b) fundum terrarum, tenementorum, molendinarum, aliorumque subtus mentionatorum, accessit.

3. Here likewise is inserted the narrative of the warrant upon which seisin proceeds, whether it be a precept out of the chancery upon a special retour, a precept of *Clare constat*, a charter under the great seal, or a charter granted by a subject, or a disposition, heritable bond, contract of feu, wadset, or marriage, &c. Of all which more fully hereafter. But, if the warrant of your seisin be a contract, you must remember to keep out these words, *cui et in cujus favorem charta, &c.*

4. After narrating the warrant, follows, *Quod quidem fasinae præceptum (c) dictus A procurator,*

you must say, *heredis deserviti et retturnati quondam C de ———, sui patris modo infra mentionando.* Or, if the seisin be given to an assignee, you must say, *tanquam jus per dispositionem et assignationem modo subtus mentionando, habens ab C de ———.*

(a) If it be a precept of *Clare constat*, add, *vulgo præceptum de Clare constat vocatum.*

(b) If the lands lie discontiguous, and there be a dispensation in the charter for taking seisin at one place for the whole lands, &c. say, *ad manerii locum seu mansionis domum de ———, tanquam locum designatum, virtute dispensationis contentæ in charta infra mentionata, pro capienda fasina pro integris terris, tenementis, molendinis, aliisque inibi et subtus mentionatis.*

(c) Or if it be a precept of *Clare constat*, add as before; or if a charter, disposition, or contract, *Quam quidem*

curator, et in nomine præfati B de —, prædicto D de —, balivo per dictum præceptum ad effectum subtus mentionatum specialiter constituto, ut dictum est, exhibuit et præsentavit, eundemque obnixè rogavit, ut suum balivatus officium in eodem sasine præcepto contentum debitæ executioni demandaret.

5. and 6. Essentials will run thus: Qui quidem balivus, sciens et percipiens dictum desiderium fore justum, rationique consonans, dictum præceptum (a) omni qua decuit reverentia in manibus suis recepit, mibique Notario publico subscribenti perlegendum, publicandum, et in vulgari sermone exponendum, coram testibus astantibus, dedit, tradidit, et deliberavit. Quod feci: cujus quidem præcepti sasinae tenor sequitur: [Here insert the precept of seisin as in the charter, and the witnesses as in the warrant.]

7. Essential, mentioned above, is as follows: Post cujus quidem (b) præcepti sasinae superscripti perlectionem, publicationem, et expositionem, præfatus D, balivus antedictus, virtute ejusmodi et officii balivatus sibi in hac parte per

dem chartam, dispositionem, vel hereditariam obligationem, vel quem quidem contractum, in se continentem dictum sasinae præceptum: or if it be one served heir in general, or an assignee, that is in feft, una cum dicto generali retturnatu seu assignatione prædicta.

(a) Vel, chartam, hereditariam obligationem, aut contractum.

(b) Vel, chartæ, dispositionis, &c. præceptique sasinae inibi contenti.

idem commissi (a), statum, sasinam hereditariam, pariter et possessionem actualem, realem, et corporalem, (b) totarum et integrarum prædictarum terrarum, decimarum, molendinarum, salmonum piscariarum, aliorumque suprascriptorum, cum pertinentibus, jacentium ut prædictum est, memorato A (c), per terræ et lapidis fundi prædictarum terrarum, manipuli frumenti crescentis vel graminum pro decimis, clap et bapper dictarum molendinarum, et retis pro dicta salmonum piscaria (d),

(a) If feisin be given to an heir or assignee, add, *secundum tenorem acti parliamenti.*

(b) If feisin be given upon an heritable bond, say, *totius et integri dicti annui redditus, qui pro tempore dictæ principali summæ — monetæ prædictæ per leges et acta parliamenti hujus regni correspondebit, annuatim levandi et percipiendi, ad duos solutionis terminos, festa scilicet Pentecostes, et Sancti Martini in hieme, per æquales portiones, de terris aliisque suprascriptis, modo super mentionato; and add, redimabili omni modo dicto annuo redditu, et sub reversione modo prolixè mentionato in dicta hereditaria obligatione: or you may insert the sum upon which the annualrent is redeemable, and the way and manner of redemption, as in the heritable bond. But if feisin be given of lands, or any other subject under reversion, say, *redimabilibus omni modo et sub reversione dictis terris aliisque suprascriptis per dictum C, a præfato B, modo et secundum tenorem clausulæ reversionis contentæ in dicta charta: or you may insert the sum, with the way and manner of redemption, as in the clause of reversion.**

(c) If the feisin be given to the heir himself, as heir served and retoured, add, *heredi deservito et retournato præfato C; or, if to an assignee, assignato, ut dictum est, constituto per dictum C.*

(d) If feisin is given for annualrent, add, *et unius denarii monetæ.*

ut moris est, dicto A, tanquam attornato antedicto, traditionem et deliberationem, secundum tenorem dicti præcepti (a) in omnibus punctis, tradidit et deliberavit, nemine contradicente aut in contrarium opponente.

8. Essential, as above mentioned, is the attorney's requiring instruments in the following manner: *Super quibus omnibus et singulis præmissis, dictus A, tanquam attornatus, et in nomine prædicto, unum vel plura instrumentum seu instrumenta, publicum vel publica, a me Notario publico sibi fieri petiit.*

9. Requisite of a formal seisin will be in the following words: *Acta erant hæc super solum prædictarum terrarum et molendinarum, horas inter — et — ante [vel post] meridiem, die mensis, anno Domini regnique regis quibus supra, præsentibus ibidem H, A, B, et C, testibus ad cuncta præmissa specialiter vocatis, pariterque rogatis et requisitis.*

The last essential, to complete a formal seisin, is the attestation of the Notary, bearing the authority of his creation, &c. commonly called *the Notary's docket*. A full copy of which you have in the first part of this treatise, p. 44.

Having now given in Latin all the requisite clauses, conform to the above ten essentials,

(a) Or, *de Clare constat, chartæ, dispositionis, &c. præceptique sasinæ inibi contenti*; if to an heir or assignee, *generalis retturnatus seu assignationis.*

mentioned

mentioned in my Lord Stair's *Institutions*; I shall here at large present the reader with the same in English.

IN the name of GOD, *Amen*. Be it known to all men by this present public instrument, that upon the twenty-first day of December, one thousand seven hundred and thirty-nine years, and of the reign of our Sovereign Lord George the Second, by the grace of God King of Great Britain, France, and Ireland, defender of the faith, the thirteenth year, in presence of me Notary-public, and witnesses subscribing, compeared personally (*a*) an discreet man *A* of —, (*b*) as procurator and attorney for, and in name of *B* of —, whose power of procuratory was clearly known to,

(*a*) Or, "*F*, bailie in that part, specially constitute by the precept of seisin under written; and sicklike, compeared personally *G*, as procurator and attorney for, and in name and behalf of *H*, whose power of procuratory was sufficiently known, &c."

(*b*) But if the vassal be personally present, say, "to whom, and in whose favour the precept of seisin, commonly called a precept of *Clare constat*, charter, disposition, heritable bond, or other writ, &c, after mentioned, is made and granted," If an infeftment be given to an heir served and retoured, add, "heir served and retoured, in manner after mentioned, to umquhile — his father." Or if to an assignee, "as having right by disposition and assignation, in manner after mentioned, from —". But if seisin be given in implement of a contract, you must take care to keep out these words, *to whom, and in whose favour, &c.*

and

and understood by me Notary-public subscribing; who also, with another discreet man, *D* of —, bailie by the precept of seisin under written specially constitute, passed (*a*) to the ground of the lands, tenements, mills, and others after mentioned; *having* and *holding* in his hands the said (*b*) precept of seisin, commonly called a precept of *Clare constat*, made and granted by an Honourable gentleman *J* of —, in favour of the said *B*, as heir to the said umquhile *C* his father, of *all* and *baill* the lands, &c. and others under written, of the date, tenor, and contents after mentioned. Which precept of seisin, commonly called a precept of *Clare constat*, the said *A*, as procurator for, and in name of the foresaid *B* of —, exhibited and presented to the said *D*, bailie by the said precept of seisin, to the effect after mentioned, specially constitute, as said is; humbly requiring him to proceed to the due execution of his office of bailiery thereby committed to him. Which request and desire the said *D*, bailie, finding to be

(*a*) Or, “to the mansion-place of —, as the place appointed, by virtue of the dispensation contained in the charter after specified, for taking seisin of the haill lands, tenements, mills, and others therein and after mentioned.”

(*b*) Or, “charter, disposition, heritable bond, or contract, containing therein the said precept of seisin under written.” I shall not here subjoin any forms of the warrants upon which seisins proceed, seeing I have set a title apart peculiarly for them.

just

just and reasonable, he accepted of the said precept, and took it in his hands with all reverence as becometh, and delivered the same to me Notary-public subscribing, to be read and published in presence of the witnesses subscribing. All which accordingly I did. Of which precept of seisin, commonly called a precept of *Clare constat*, the tenor follows: [*Here must be inserted the baill precept of Clare constat verbatim, or other precept of what kind soever, subjoining the subscriptions, as they are in the precept, or other warrant.*] After reading and publishing of the which precept of *Clare constat*, the said D, bailie foresaid, by virtue thereof, and of his office of bailiery in that part specially committed to him (a), gave and delivered to the said A (b) heritable state and seisin, real, actual, and corporal possession, of *all* and *baill* (c) the lands, teinds, mills, salmon-fishing, and others above written, with

(a) If seisin is given to an heir, add, “conform to the act of parliament.”

(b) And if the vassal be personally present, and be heir served and retoured, add, “heir served and retoured to the said —.”

(c) If seisin be given upon an heritable bond, add, “the foresaid annualrent of three hundred merks money foresaid, or such an annualrent as by the laws and acts of parliament for the time shall effeir and correspond to the said principal sum of six thousand merks money foresaid, yearly to be uplifted and taken at the terms of payment, and by equal portions, and forth of the lands and others above written, in manner particularly above mentioned.”

their

their pertinents, lying as said is (a); and that by deliverance to the said *A*, as procurator, and in name foresaid, of earth and stone of the ground of the said lands, an handful of growing corn or stubble for the said teinds, clap and happer for the said mill, net for the said salmon-fishing (b), as use is, after the form and tenor of the said precept of *Clare constat*, in all points, none opposing or contradicting the same. Whereupon, and all and sundry the premisses, the said *A*, procurator foresaid, asked, required, and took instruments, ane or mae, in the hands of me the said Notary-public subscribing. These things were done upon the ground of the foresaid lands and mills, betwixt the hours of — and — before [*or after*] noon, place, day, month, year of God, and of the king's reign, respectively above written, before and in presence of *M, N, O, and P*, witnesses to the haill premisses specially called and required. [*Follows the Notary's docket, &c.*]

(a) And if it be for annualrent, add, “redeemable always, and under reversion the lands and others above written, in manner at length mentioned in the said heritable bond.” But if seisin be given of any subject under reversion, say, “redeemable always, &c. by the said *C* from the said *D*, in manner, and conform to the clause of reversion contained in the said charter.”

(b) And if seisin be given for annualrent, add, “and an penny money for the said annualrent.”

Follows

Follows the style of an instrument upon a charter.

“ IN Dei nomine, Amen. Per hoc præsens
 “ publicum instrumentum cunctis pateat
 “ evidenter, et sit notum, quod, anno incar-
 “ nationis Dominicæ millesimo septingente-
 “ simo trigésimo nono, mensis vero Decem-
 “ bris die septima, et regni S. D. N. Geor-
 “ gii Secundi, Magnæ Britanniae, Franciæ, et
 “ Hiberniæ regis, fideique defensoris, anno
 “ decimo tertio, in mei Notarii publici et
 “ testium subscribentium præsentia persona-
 “ liter comparuit, super fundum terrarum et
 “ baroniæ de B, apud manerii locum ejus-
 “ dem, tanquam locum designatum pro sa-
 “ sina de integris terris, baronia, aliisque sub-
 “ tus specificatis, capienda, A de B ; *habens*
 “ et in suis manibus *tenens* quandam chartam,
 “ præceptum sasinae subinfertum in se conti-
 “ nentem, factam, datam, et concessam, per
 “ dictum S. D. N. Regem, sub suo magno
 “ sigillo, cum consensu Dominorum ipsius
 “ thesaurarii et scaccarii prædicti regni Sco-
 “ tiæ, memorato A de B, heredibus suis et
 “ assignatis quibuscunque, hereditarie et irre-
 “ dimabiliter, de totis et integris terris, &c.”

[Here take in the lands as in the *Dedimus* of the charter, continuing on till the clause of *Pertaining*, which begins, *Quæquidem* ; which lands must also be inserted *verbatim* in the *seisin* as in the charter, till you come either to

a *Novo damus*, or some other clause before the *Tenendas* : and if there be a *Novo damus* in the charter, or an erection into a barony, these or the like clauses must be briefly mentioned. In a seisin following upon a charter wherein both these clauses were contained, they were briefly thus expressed :] “ *Quæquidem char-*

“ *ta continet novam donationem omnium et*
“ *singularum prædictarum terrarum, decima-*
“ *rum, aliorumque præscriptorum, et unionem*
“ *et erectionem earundem in unam integram*
“ *et liberam baroniam, nuncupatam baro-*
“ *niam de B ; atque unica fasina, nunc per*
“ *dictum A, et per ejus heredes et assignatos*
“ *omni tempore futuro, capienda apud di-*
“ *ctum manerii locum de B, vel super solo*
“ *alicujus alterius partis terrarum supra men-*
“ *tionatarum, per traditionem terræ et lapidis*
“ *fundi, declaratur stare et sufficientem esse sa-*
“ *sinam pro integris terris, decimis, jure pa-*
“ *tronatus, aliisque supra recitatis, sine ulla*
“ *alia speciali aut particulari fasina, apud ali-*
“ *quam aliam partem seu locum capienda,*
“ *non obstante quod eadem sint diversæ de-*
“ *nominationis, ac contiguæ minime jaceant ;*
“ *ac etiam continet ratificationem omnium*
“ *chartarum, dispositionum, et infeofamento-*
“ *rum, aliorumque jurium et securitatum fa-*
“ *ctarum dicto A, vel —, vel alicui eo-*
“ *rum, vel quibuscunque eorum prædecesso-*
“ *rum aut authorum, terrarum aliorumque*
“ *supracriptorum, in omnibus punctis, clau-*
“ *fulis, et articulis eorundem : Tenendas de*

H

“ dicto

“ dicto S. D. N. Rege, et successoribus suis,
 “ pro solutione taxatarum devoriarum, wardæ,
 “ non-introitus, relevii, et maritagii, nec non
 “ feudi-firmæ, in dicta charta mentionato-
 “ rum.” [This is the charter mentioned in
 the feisin; after which is subjoined the style
 of the feisin immediately, in this manner :]
 “ Quamquidem chartam prænominatus A,
 “ Titio, vicecomiti in hac parte vicecomi-
 “ tatus de E per præceptum sasinæ subinfer-
 “ tum specialiter constituto, præsentavit, i-
 “ psumque rogavit, ut, quatenus inibi conti-
 “ nebatur, debitæ executioni demandaret;
 “ cuiquidem rogatui, tanquam in se justo et
 “ rationi admodum consentaneo, dictus vice-
 “ comes obedire volens, eandem chartam in
 “ manibus suis recepit, et mihi Notario pu-
 “ blico perlegendam, publicandam, et in vul-
 “ gari, astantibus testibus, explanandam, tra-
 “ didit. Quod feci : cujus vero præcepti
 “ tenor sequitur : Vicecomiti, &c.” [Here
 take in the precept *verbatim* as in the charter,
 to the very end thereof, subjoining the sub-
 scriptions of the director to his Majesty’s chan-
 cery, and that of the keeper of the great seal,
 thus : *Written to the great seal, and regisrate*
the thirtieth day of November one thousand seven
hundred and thirty-nine. Sic subscribitur, W. C.
Sealed at Edinburgh, the first day of December one
thousand seven hundred and thirty-nine. Sic sub-
scribitur, H. R. Then follow forth the style of
 the feisin thus :] “ Post cujusquidem chartæ,
 “ præceptique præinferti in eadem contenti,
 “ perlecturam,

“ perlecturam, publicationem, et in vulgari, a-
 “ stantibus testibus, explanationem, dictus Ti-
 “ tius, vicecomes in hac parte antedictus, vir-
 “ tute et vigore ejusdem, ac sui vicecomitatus
 “ officii sibi incumbentis, fasnam totarum et in-
 “ tegrarum prædictarum terrarum et baroniae
 “ de B, cum omnibus earundem pertinentiis,
 “ unitis, comprehendentibus et jacentibus ut
 “ prædicitur, memorato A, personaliter præ-
 “ senti et acceptanti, per terræ et lapidis fun-
 “ di prædictarum terrarum et baroniae de B,
 “ apud manerii locum ejusdem, in ejus ma-
 “ nibus, ut moris est, traditionem et de-
 “ liberationem, secundum formam et teno-
 “ rem antedictæ chartæ, dedit, donavit,
 “ contulit, et deliberavit. Super quibus o-
 “ mnibus et singulis præmissis, dictus A a
 “ me Notario publico subscribente sibi fieri
 “ petiit hæc præsens publicum instrumentum,
 “ seu instrumenta publica, unum vel plura.
 “ Acta erant hæc super fundum dictarum
 “ terrarum et baroniae de B, apud manerii
 “ locum ejusdem, hora tertia pomeridiana,
 “ aut eo circa, sub anno, die, mense, et regis re-
 “ gno præscriptis, præsentibus ibidem probis
 “ viris D et E, F et G, testibus in præmissis
 “ rogatis, pariterque vocatis et requisitis.”
 [Then is subjoined the Notary’s docket, &c.]

In old style the compearance is : “ In mei
 “ Notarii publici et testium subscriptorum
 “ præsentis personaliter comparuit probus et
 “ discretus vir A, vicecomes de — in hac

“ parte per *fasinae* praeceptum subscriptum
 “ specialiter constitutus, et ad solum et fun-
 “ dum terrarum subtus specificatarum acces-
 “ sit; et ibidem quoque comparuit hono-
 “ rabilis et discretus vir B, et quoddam *fa-*
 “ *sinae* praeceptum dicti S. D. N. Regis, per-
 “ gamena scriptum, sub testimonio sui ma-
 “ gni sigilli, ut apparuit, roboratum et sigil-
 “ latum, praefato A vicecomiti in hac parte
 “ antedicta praesentavit, eum requirens qua-
 “ tenus ea quae in eadem continebantur de-
 “ bitae executioni demandaret. Qui vero
 “ vicecomes omni reverentia debita hujus-
 “ modi *fasinae* praeceptum ad manus recepit,
 “ idemque mihi Notario publico subscriben-
 “ ti perlegendum et publicandum tradidit:
 “ cujus *fasinae* praecepti, in dicta charta con-
 “ tenti, tenor de verbo in verbum sequitur,
 “ et est talis, &c.” So followed the precept of
 feisin, which, in old times, was little less than the
 charter now-a-days, differing from it in this,
 that in the precept of feisin were mentioned all
 other clauses besides the *Tenendas* and *Redden-*
da; and then the style went on as the other.

An instrument of feisin to one in liferent,
 and another in fee, carries two seisins; and the
 clause of feisin must be thus: “ — gave and
 “ delivered liferent state and feisin, and also
 “ possession of the annual rent above specified,
 “ yearly to be uplifted at the terms above re-
 “ hearsed, forth of the lands and others above
 “ written, or any part thereof, lying as is a-
 “ bove mentioned, to the said A; and like-
 “ wise

“ wife heritable state and seisin of the foresaid
 “ annualrent, to be uplifted as is above ex-
 “ pressed, to the said B, be deliverance of
 “ earth and stone of the lands above rehear-
 “ sed, and an penny, as use is, to the said A,
 “ personally present, and receiving the same,
 “ for himself, and as attorney, and in name
 “ and behalf of his daughter above mention-
 “ ed: To be holden, &c.” Here the life-
 renter compeared personally for himself, and
 attorney for the fiar.

Besides the way of giving seisins above mentioned, they are given *propriis manibus*, and are of two sorts. In the first the warrant of seisin is therein narrated, as in other seisins, only the precept of seisin is not *verbatim* ingrossed; but, to supply this defect, the giver *propriis manibus* subscribes it. The second does not narrate the writ at all, only the Notary makes mention, that seisin is given in supplement of a writ, which he condescends on by the date; neither does the granter subscribe the same. Craig, lib. 2. dieg. 7. speaking of seisins *propriis manibus*, says, *Ea quae propriis domini manibus fit, si charta, quae conditiones continet, non appareat, durissimam secum trahit conditionem et interpretationem; nam accipientem semper in servitium militare obligat, cum heredis et terrarum custodia, et ejus maritatione.* The first of these being the most complete, I shall here take occasion to consider its formalities only, noticing where it differs from those mentioned by my Lord Stair.

In the first two it will be the same; and in the third, *viz.* the narrating of the writ, in supplement of which seisin *propriis manibus* is given, the difference is not great from other ordinary seisins: only the date is inserted in the beginning thereof; whereas other narratives, where the precept of seisin (which is generally in the end of the writ) is ingrossed, refers to the date. The date is inserted in this manner: *Habens, &c. quendam chartam, dispositionem, &c. de data —, factam et concessam per dictum A de —.* Or in English thus: “Having, &c. an charter, disposition, &c. of the date the — day of —, made and granted by the said *A* of —.”

As to the fourth, *viz.* the delivery of the writ, in supplement whereof seisin is given, there is some variation from what is above related; wherefore I have set it down as follows: *Quamquidem chartam, vel dispositionem, &c. dictus B exhibuit et praesentavit praefato A personaliter praesenti, eundemque obnixè rogavit quatenus procederet ad dandum (ex propriis suis manibus) statum, iustitiam, &c. as before.* Or thus in English: “Which charter, or disposition, &c. of the date, tenor, and contents above written, the said *B* exhibited and presented to the said *A* personally present, humbly requiring him, in implement and in consequence thereof, to proceed to the giving (*ex propriis suis manibus*) heritable state and seisin, &c.”

As to the fifth and sixth essentials, there is

no difference in this seisin from those above, only putting in the superior's name in place of the bailie's, and leaving out the words *omni qua decuit reverentia*; and observe what was formerly said, that as the writ is mentioned in the beginning, you do not add *cujusquidem praeceptum*.

The seventh essential will be the same as above, only, in place of *praecepti*, say *chartae*, &c. as the writ is; and, after *expositionem*, *praefatus A, pro observatione et impletione ejusdem, dedit, tradidit, et deliberavit dicto B (ex propriis suis manibus) statum, sasinam, &c.* the rest of the seisin as before.

It has been told, that the giver of this kind of seisin subscribes the same; and this seems to have been introduced from the analogy of *aet* 38. *parl.* 6. and *aet* 81. *parl.* 9. Q. Mary, anent subscribing of instruments of resignation: and this subscription is adjected after the words *rogatis et requisitis*, in this manner: *Et similiter dictus A, in signum et testimonium veritatis omnium et singulorum praemissorum, hoc praesens publicum instrumentum subscriptione et chirographo suo munivit, loco, die mensis, annoque Domini superscriptis, coram testibus supra designatis et subscribentibus.* Or thus: "As also the said
"A, in sign and token of the verity of all
"and sundry the premisses, has instantly subscribed this present public instrument,
"place, day, month, year of God, and of
"his Majesty's reign particularly above
"mentioned, before the witnesses above
"designed,

“ designed, and hereto subscribing, &c.”

The tenor of the other kind of seisin will be the same as above, only, at the inserting of the compearance of the person who gives seisin *propriis manibus*, after the word *comparuit*, add, *super solo terrarum, tenementorum, &c. aliorumque infra scriptorum, honorabilis et generosus vir A de —, donator et concessor chartae [vel dispositionis, &c.] postea mentionatae, cum alio discreto viro E, (a) tanquam procuratore, &c. et ibidem praefatus A, pro observatione et implementatione dictae chartae, et obligationis ad infeodandum inibi contentae, ex ipsius parte, (propriis suis manibus) tradidit et deliberavit statum, &c.* And after the words (in the end of the seventh essential of a formal seisin) *ut moris est*, add, *super solo earundem, in manibus dicti E, procuratoris pro et in nomine dicti —, nemine contradicente aut in contrarium opponente, secundum formam et tenorem dictae dispositionis terrarum aliorumque suprascriptorum, et obligationis ad infeodandum inibi contentae, factae et concessae per dictum A ad et in favorem dicti —, quae est de data —, die mensis —, in omnibus punctis et articulis ejusdem. Super quibus omnibus, &c.* as above.

If the seisin be formed in English, it will be the same as in the above example, to the words *compeared personally*; and then add, “ up-
“ on the ground of the lands, tenements, &c.

(a) Or, if the person to whom seisin is given be present, say, *cui et in cujus favorem dicta charta est facta et concessa.*

“ and

“ and others under written, an honourable
 “ and discreet gentleman *A* of ———, grant-
 “ er and subscriber of the charter [or dispo-
 “ sition, &c.] after mentioned, with ano-
 “ ther discreet gentleman *E* of ———, as
 “ procurator for and in name of ———, in
 “ whose favour the said charter, disposition,
 “ &c. is made and granted; and there the said
 “ *A*, for implement and fulfilling his part of the
 “ said charter, and obligation to invest there-
 “ in contained, did, *ex propriis suis manibus*,
 “ give and deliver heritable state and seisin,
 “ &c.” And after the words, *as use is*, in the
 end of the seventh essential, add, “ upon
 “ the ground thereof, in the hands of the
 “ said *E*, as procurator, and in name of the
 “ said ———, none opposing or contradicting
 “ the doing thereof, after the form and te-
 “ nor of the said charter, disposition, &c.
 “ and obligation to invest therein contained,
 “ of the lands and others above written, made
 “ and granted by the said ——— to the said
 “ ——— of the same, which is dated the ———
 “ day of ——— years, in all points. Where-
 “ upon, and upon all and sundry the premis-
 “ ses, &c.” [*as above.*]

I find in the protocol-books of several No-
 taries, written in the reign of K. James VI.
 that in seisin *propriis manibus* they do not men-
 tion the date of the writ in implement of
 which seisin is given; but only, after the
 words *ex propriis suis manibus*, add *secundum te-
 norem chartae desuper confectae*: as also, in the
 said

said books, I find a clause very frequent in these sort of feifins, inserted after these words, *jacentes infra vicecomitatum de ———* ; *et ibidem dictus A, non vi aut metu ductus, aut errore lapsus, compulsus aut coactus, sed sua mera, pura, libera, et spontanea voluntate, propriis suis manibus, statum, sasinam, &c.*

My Lord Stair, *lib. 2. tit. 2. § 19.* says, That when the superior immediately gives feifin to the vassal, in that case the Notary's warrant is sufficiently instructed by the feifin, and by the disposition, contract of alienation, or bond ; or when the feifin is *propriis manibus secundum chartam conficiendam*, if a charter thereafter made be shown : as a feifin *propriis manibus* by a father to his son, reserving the father's life-rent, was found valid against a second wife's infestment granted for a competent tocher, being adminiculated by a bond granted by the father, of the same date with the feifin, obliging him to warrant the same, 11th February 1669, Buchan *contra* Tait, observed by Stair. But a feifin *propriis manibus* of a tenement within burgh, granted by a father to his son for love and favour, bearing resignation by the father in a bailie's hand, was found not to instruct without a warrant or adminicle in writ, 11th February 1681, Irvine *contra* Corfan, likewise observed by Stair.

But feifins *propriis manibus* granted by husbands to their wives, in contemplation of marriage, having no adminicle but the marriage, the Lords, according to the different cases, have
sometimes

sometimes sustained them when they were suitable to the parties, and not exorbitant, and where the question was only with the husband's heir, or an appriser.

Nevertheless such seisions, without an adminicle in writ, are very ready to be improven; as may be learned from the following decision, observed by Stair, 19th June 1668, the relict of Galrigs *contra* Wallace of Galrigs. The relict of Galrigs pursued for mails and duties upon her seisin given *propriis manibus*. It was alledged for the defender, No process, because the seisin is but *assertio notarii* without a warrant, there being neither a contract, nor obligation to give such a seisin. It was answered, That instruments of seisin, given to a wife *propriis manibus*, have a sufficient adminicle and presumption by the marriage, and the duty of the husband to provide the wife; especially where there is no contract, nor other provision; but most of all where the wife renounced her jointure she had with a former husband, in favour of the granter of the seisin and his creditors: which is a strong presumption he would give her something in lieu thereof. The Lords sustained the seisin. But thereafter, 9th January 1669, Galrigs offered to improve the seisin by the witnesses inserted: which being four, two of them deposed positively, that they were never witnesses to a seisin given by Galrigs to his wife; and the third deposed, That he remembered not that he was a witness; the fourth deposed,
That

That he was witness; but said, that this seisin was in summer, whereas it bore to be in winter: the Notary abode by the seisin. The Lords found the seisin improven, but would not examine the Notary, nor any other person, mainly in consideration that the seisin was *propriis manibus*, without any other adminicle: but if there had been an adminicle, the Notary and one of the witnesses being positive, the seisin would not have been improven; for where there is a warrant, mediate or immediate, providing a seisin be given, *quod fieri debet, facile præsumitur*: and therefore the witnesses not remembering, or denial, will hardly improve such seisins, unless their testimony were positive, giving special circumstances of their denial, as being in another country, or far distant place, at that time, if the truth of that were otherwise astructed. But the general denial to be witnesses, could import no more than *non memini*; and therefore an adminicle in writ, with the protocol, or oath of the Notary, if he were alive, and especially if possession followed for some time; these would more strongly approve, than the not remembrance, or general denial of the witnesses inserted, would improve. By what has been said, Notaries will be cautious not to copy after this last form.

Having now finished the matter of seisins of lands, I shall, in the next place, for the benefit of such as are clerks to royal burghs, who also ought to be Notaries, proceed to seisins

seifins in burgage-tenements. And as these seifins are, by the constant custom of the burgh of Edinburgh, writ in Latin, although the warrant on which they proceed be in English, I shall only insert them in that language, not inclining to swell this treatise with things that are not for the general instruction and use of the whole body of Notaries.

T I T L E III.

Of instruments of seisin in burgage-tenements.

Notwithstanding that infeftments in burgage tenements participate as much of the nature of resignations as of seifins, yet, seeing they are best known by the last name, I thought it proper to insert them in this place.

Seifins in burgage-lands, by *act 27. parl. 1.* James VI. can only be given by one of the bailies of the burgh, as the king's bailie; and none can be Notary thereto but the common clerk of the burgh; otherwise the same are declared null; and the clerk likewise extends them. But in cases of necessity, where there was neither bailie nor town-clerk, and where one was obliged to do diligence, seisin within burgh hath been sustained when taken by the sheriff-clerk; as was decided in the case of Thomson *contra* Mackitrich, 21st July 1666, observed by Stair.

From this act, it is to be observed, that the

magistrates of burghs-royal are not superiors of burgage-lands; but, being the king's bailies and sheriffs within the burgh, are commissioned and impowered by their erection, to seise their burgesses in the lands and tenements lying within their territories: for in effect the community of the burgesses are the king's vassals, and not the individuality of every burgess.

It is further to be observed, that burgage-lands never fall in nonentry; for the apparent heir being once infest, his seisin draws back to the day of his predecessor's death: and the reason is obvious; for nonentry, being a casualty due to the superior upon the death of his vassal, cannot fall out in communities or burghs, because they never die.

By the 16th *act, parl.* 22. James VI. anent registration of seisions, these in burgage-lands were excepted, (as has been told in the preceding title); and so far were these seisions exempted from such solemnities, that the Lords sustained a seisin within burgh, subscribed by the town-clerk, though there was no vestige of it in the town's register nor in the clerk's protocol, and had been latent for many years, 30th June 1668, Burnet *contra* Swane, observed by Stair. For although town-clerks use to register seisions, yet there being no necessity upon them to register, and the seisions not being annulled for want of registration, singular successors in burgage-lands were not sufficiently secured, till by *act* 11. *parl.* 3. Ch.

Ch. II. it was statute, That all instruments of feisin of tenements within burghs-royal, or freedoms thereof, holding burgage, and generally all other writs which are enjoined by *act* 16. *parl.* 22. Ja. VI. shall be inserted and registered in the town-clerks books of the several burghs *respective*, within sixty days after the date of the same; and if they be not so inserted, the same are declared null, with respect to third parties acquiring a perfect and lawful right to the said tenements, but prejudice always to them to use the said writs against the parties makers thereof, their heirs and successors.

By this act the town-clerks are to keep a separate book therefore, depending only upon the magistrates of the burgh, without necessity of any warrant from the clerk-register; and likewise they are to keep minute-books of the same, which are to be quarterly signed and compared by the provost and bailies of the several burghs. The form of which comparing take as follows: "Edinburgh, the — day of — years. The principal register of seisins within the burgh of Edinburgh, being compared with the minute-book thereof, conform to act of parliament made *in anno* 1681, are found to agree exactly together; as is testified by us the magistrates of the said burgh subscribing."

Vide tit. 8. of reversions.

The clerk's docket to the feisin will be the same as in the long docket at the end of *tit. 4.*

part 1. only, after his name, and the words *Notarius publicus*, must be insert, *et clericus communitatis burghi de* —.

The feisin is likewise registrate, and marked upon the back by the same clerk, thus:
 “ Edinburgh, the — day of — years.
 “ Registrat in the — and — leaves of
 “ the first [*or* second] protocol of *G H*, con-
 “ junct clerk of Edinburgh, conform to the
 “ act of parliament 1681, anent registration
 “ of seisins and others within burgh, by
 “ me.”

However, seisins taken out of the town's books, not by the town-clerk who gave the feisin, but by his successor, will not serve for a principal feisin, without a warrant or admittance, the town-book being but the protocol of the town-clerk; and therefore either the town-book must be produced, that the feisin may be transumed, or commission granted for inspection or collation; which being returned, was found to suffice as a transumpt, 11th February 1681, *Irvine contra Corfan*, observed by Stair.

These seisins differ conform to the several kinds thereof; some are given to apparent heirs, cognosced by hasp and staple; others are given to purchasers upon disposition, or upon contracts of marriage, wadset, or heritable bonds or adjudications.

Infeishments by hasp and staple are given in this manner: “ The bailie of the burgh, with
 “ his clerk and the necessary witnesses, being
 “ met

“ met at the tenement, whereof seisin is to be
 “ given, the apparent heir represents to them,
 “ that his father, or other predecessor, died
 “ last vest and seised in that tenement; and,
 “ for verifying it, he exhibits to the bailie
 “ and his clerk, before the witnesses, his pre-
 “ decessor’s infeftment; adding withal, that
 “ it was notorious that he is apparent heir,
 “ and nearest of kin to this predecessor, his
 “ father, grandfather, or the like; and there-
 “ fore he requires the bailie to give to him
 “ state and seisin of that tenement by hasp
 “ and staple, conform to the use and custom
 “ of burgh. Whereupon the bailie, albeit
 “ he know the truth of what is so said, in-
 “ quires at the witnesses, or other persons in
 “ their company, if he who demands seisin
 “ was the apparent heir to the person last in-
 “ feft, or habite and repute such; and upon
 “ their answering affirmatively, he causes the
 “ apparent heir take hold of the hasp and
 “ staple of the door, and enter the house, and
 “ bolt the door upon himself; who coming
 “ out, takes instruments in the hands of
 “ the clerk of the burgh, for certifying what
 “ was done: which instrument is duly regi-
 “ strate in the town-court books.”

A burgh of barony, or of regality to which
 the privilege of the king’s free burgh-royal is
 granted, though neither the lands nor the
 town be holden of the king in free burgage,
 but of the prince, is nevertheless allowed to
 give seisins by hasp and staple, 13th Novem-

her 1623, *Marshal contra Marshal*, observed by Durie.

Seisin to an heir cognosced by hasp and staple.

IN Dei nomine, &c. personaliter accessit honorabilis vir A, unus balivorum burghi de —, ad illud tenementum terræ, ante et retro, subtus et supra, cum pertinentibus; olim pertinens ad B de —, deinde ad C de —, et deinde ad demortuum D scribam in Edinburgo; jacens in dicto burgo de —, ex australi latere vici regii in clausura vocata —, et occidentali parte ejusdem, inter terram quondam E, deinde quondam F, et nunc G, ex boreali, terras quondam H, deinde J, et nunc K, ex australi, et transitum clausuræ vulgo vocatæ —, ex occidentali, et transitum dictæ clausuræ vocatæ —, ex orientali partibus: et ibidem dictus balivus, virtute et vigore sui officii, cognovit et intravit providum et honestum virum L scribam in Edinburgo, tanquam filium legitimum et propinquiorem heredem (a) dicti quondam D sui patris, in et ad totum et integrum dictum tenementum terræ, ante et retro, subtus et supra, jacens in dicto burgo de —, et bondatum ut dictum est, per terræ et lapidis dicti tenementi deliberationem, et fixularum et tenelarum traditionem; ipsumque L, tanquam filium legiti-

(a) If the propinquity appear by a general service, say, *deservitum et reiturnatum ad dictum quondam*, &c.

num et heredem (a) dicti quondam D sui patris, in toto et integro dicto tenemento terræ, ante et retro, subtus et supra, jacente in dicto burgo, et bondato ut dictum est, investiendo hereditarie sasi- vit, ut infra burgum heredibus burgensibus in ta- libus fieri consuetum, salvo jure cujuslibet (b). Su- per quibus omnibus et singulis præmissis præfatus

(a) And if it be by a service, add, *deservitum et ret- turnatum, &c.*

(b) In a case where the apparent heir disposes his pre- decessor's burgage-lands before he is infest himself, the cognition of his propinquity in blood to the deceased, and the purchaser's infestment, may be inserted in one and the same seisin, thus: *et sine mora W scribe in Edinburgo, procurator rite et legitime constitutus, ac in nomine dicti L, hereditarii proprietarii tenementi terræ supra et sub- tus scripti, ut mihi Notario publico subscribenti, per ipsius procuracionis literas, contentas in quibusdam venditionis et alienationis literis, per præfatum L, Titio, heredibus suis et assignatis quibuscunque, factis et concessis, de da- ta —, lucide constabat, totum et integrum tenemen- tum terræ, ante et retro, subtus et supra, jacens, &c.* [Here the tenements as bounded are again to be repeated, and then say], *in manus dicti balivi sursum reddidit, pu- reque et simpliciter resignavit, in favorem, proque nova infodatione ejusdem præfato Titio, modo subscripto, dan- da et concedenda. Qua resignatione sic rite et legitime facta et admissa, dictus balivus, virtute et vigore sui officii, et de speciali rogatu dicti procuratoris resignantis, statum, sasinam, possessionem corporalem, actualem, et realem, pari- ter et sasinam hereditariam, totius et integri dicti tene- menti terræ, pertinentis ad dictum B, &c. [as above], per terræ et lapidis fundi dicti tenementi terræ deliberationem, præfato Titio, personaliter præsentanti et acceptanti, contu- lit, exhibuit, et, secundum tenorem dictarum venditionis et alienationis literarum, dedit pariter et deliberavit, salvo jure cujuslibet, &c. [the rest as above.]*

L,

L, a me Notario publico subscribente, sibi fieri petiit hoc præsens publicum instrumentum, seu plura publica instrumenta. Acta erant hæc super fundum dicti tenementi terræ, horas inter nonam et decimam ante meridiem, sub anno, die, mense, regnoque regis præscriptis, præsentibus ibidem providis et honestis viris W et R, J et S, cum diversis aliis, testibus ad præmissa vocatis et requisitiis. [Then follows the Notary's docket.]

If feisin be given to a purchaser and his wife on a disposition, for her life-rent-*use* alienably, the feisin will be the same as above, until you come to the delivery of feisin by the bailie, which begins with these words, *et ibidem dictus balivus, virtute et vigore, &c.* in place of which say, *et ibidem W scribe in Edinburgo, procurator rite et legitime constitutus, ac in nomine dicti L, hereditarii proprietarii dicti tenementi terræ, ut mihi Notario publico subscribenti, per ipsius procuratoris literas, contentas (a) in quibusdam venditionis et alienationis literis, per ipsum, Titio et Semproniam ejus sponsam, et eorum alteri diutius viventi, in conjuncta infeodatione, pro dictæ Semproniam vitali redditu solummodo, et Maevio eorum filio, quo deficiente, dicti Titii hereditibus legitimis et assignatis quibuscunque, confectis, ac super fundum dicti tenementi terræ productis et perceptis, de data —, lucide constabat,*

(a) If feisin be given on a wadset, say, *in quodam contractu hypothecationis et impignorationis, inito et perfecto inter illum et Titium, prout in dicto contractu, super fundum dicti tenementi terræ productis et perceptis, &c.*

totum

totum et integrum dictum tenementum terræ, ante et retro, subtus et supra, cum pertinentibus, olim pertinens, &c. [Here take in the bounding as in the disposition, and then say], *et bondatum ut prædicitur, per fustim et baculum, in manus dicti balivi sursum reddidit, pureque et simpliciter resignavit, in favorem, proque nova infeodatione ejusdem præfato Titio, modo superscripto, danda et concedenda (a).* Qua resignacione sic rite et legitime facta et admissa, dictus balivus, virtute et vigore sui officii, et de speciali mandato dicti procuratoris resignantis, statum, possessionem corporalem, actualem, realem, pariter et sasinam hereditariam, totius et integri dicti tenementi terræ, ante et retro, subtus et supra, cum pertinentibus, olim pertinentis, &c. [Here the lands are again repeated, then follows,] *jacentis in dicto burgo, et bondati ut prædicitur, per terræ et lapidis fundi dicti tenementi terræ deliberationem, memoratis Titio et Sempronie ejus sponsæ, eorumque alteri diutius viventi, pro vitali redditu dictæ Sempronie solummodo, ibidem personaliter præsentibus et acceptantibus, secundum tenorem dictarum*

(a) If seisin be given on a wadset, add, *redimabili omni modo et sub reversione dicto tenemento terræ, a præfato Titio ejusque prædictis, per dictum L, ejusque heredes, successores, et assignatos, per solutionem iis, aut in eorum usus consignationem, &c.* [Here take in the precise words of the clause of reversion, and where the same is to be assigned, with the place of redemption, and upon what premonition; and then, immediately after the clause of seisin, and before that which begins *super quibus, &c.* add], *redimabili omni modo dicto tenemento terræ, et sub reversione modo superscripto.*

venditionis

venditionis et alienationis literarum in omnibus, dedit, tradidit, contulit, pariter et deliberavit, salvo jure cujuscunque. Super quibus omnibus et singulis præmissis, præfati Titius et Sempronia a me Notario publico sibi fieri petierunt hoc præsens publicum instrumentum, &c. [as in other seifins.]

If seifin be given of an annualrent out of burgage-lands, after having narrated the comparance of the Notary, witnesses, bailie, and party or procurator, at the word *contentas*, in the beginning of the foregoing seifin, add,
 “ in quadam hereditaria obligatione per ipsum
 “ confecta, Titio, ejusque heredibus et affi-
 “ gnatis quibuscunque, ac super fundum dicti
 “ tenementi terræ producta et perlecta, de
 “ data ———, lucide constabat, totum et
 “ integrum unum annum redditum ducenta-
 “ rum mercarum monetæ Scotiæ, vel talem
 “ annum redditum, qui pro tempore, per
 “ quamlibet supervenientem legem, corre-
 “ spondebit principali summæ quater mille
 “ mercarum, annuatim levandum et perci-
 “ piendum, ad duos anni terminos, festa sci-
 “ licet Pentecostes, et Sancti Martini in hie-
 “ me, per æquales portiones, de toto et in-
 “ tegro dicti L tenemento, ante et retro,
 “ subtus et supra, cum pertinentibus, perti-
 “ nente olim,” [Here take in the boundings
 of the tenements, as in the heritable bond,
 and then add], “ vel de quavis parte vel por-
 “ tione ejusdem, promptioribus censibus,
 “ firmis, proficuis, et devoriis ejusdem, per
 “ fustim

“ fustim et baculum, in manus dicti balivi
 “ fursum reddidit, pureque et simpliciter re-
 “ signavit, in favorem, proque nova infeo-
 “ datione et fasina danda et concedenda præ-
 “ fato Titio, ejusque heredibus et assignatis
 “ quibuscunque, hereditarie; redimabili et
 “ sub reversione dicto annuo redditu, per
 “ dictum L, ejusque heredes et assignatos, a
 “ præfato Titio et ejus prædictis, per soluti-
 “ onem iis dictæ principalis summæ quater
 “ mille mercarum, omniumque annuorum
 “ reddituum pro tempore debitorum, infra
 “ prætorium dicti burgi, die festum Pente-
 “ costes, vel Sancti Martini in hieme, præ-
 “ cedente, si sit legalis, qua deficiente, pro-
 “ xima die legitima sequente, inter ortum et
 “ occasum solis, super præmonitione quadra-
 “ ginta dierum debite facienda, per prædi-
 “ ctum L, ejusque prædictos, præfato Titio,
 “ ejusque prædictis, personaliter vel apud
 “ ipsorum pro tempore habitationis domum,
 “ in præsentia Notarii testiumque, prout con-
 “ gruit; vel per consignationem dictarum
 “ summarum, si dictus Titius ejusve prædicti
 “ abfuerint, vel hasce præsentis accipere re-
 “ cusarint, in manus præpositi, vel cujusvis
 “ balivorum dicti burgi, quæ Titio ejusque
 “ prædictis periculo consignantis profuturæ
 “ sunt, secundum dictam hereditariam obli-
 “ gationem, et procuratoriam resignationis
 “ inibi contentam, in omnibus punctis. Qua
 “ resignatione sic rite ac legitime facta et ad-
 “ missa, dictus balivus, virtute et vigore sui
 “ officii,

“ officii, et de speciali mandato dicti procu-
 “ ratoris resignantis, statum, possessionem cor-
 “ poralem, actuale[m], et realem, totius et in-
 “ tegri dicti annui redditus, vel talis annui
 “ redditus, qui pro tempore, per leges hujus
 “ regni, dictæ principali summæ correspon-
 “ debit, annuatim levandi et percipiendi, ad
 “ dictos duos anni terminos, per æquales
 “ portiones, de toto et integro dicto tenemen-
 “ to terræ, ante et retro, subtus et supra,
 “ jacente in dicto burgo de —, et bondato
 “ ut prædicitur, per terræ et lapidis fundi
 “ dicti tenementi, et unius denarii, ut moris
 “ est, deliberationem, honesto viro M de
 “ —, tanquam attornato, et in nomine
 “ prædicti Titii, contulit, exhibuit, et, se-
 “ cundum tenorem dictæ hereditariæ obli-
 “ gationis, dedit pariter et deliberavit: redi-
 “ mabili omni modo dicto annuo redditu, et
 “ sub reversione modo prædicto. Super qui-
 “ bus omnibus,” &c. [as in other seifins.]

If a father shall resign his burgage-lands to
 his son, and the son at the same time shall re-
 sign the said lands in favour of his wife, for
 her liferent-use, the seifin will be the same as
 in the first by hasp and staple, until you come
 to the bailie's delivery of seifin; and then say,
 “ nec non accessit idem balivus ad illud tene-
 “ mentum terræ, ante et retro, subtus et su-
 “ pra, olim,” &c. [Here take in the tene-
 ments as designed and bounded, and then
 say], “ et ibidem A scribe in Edinburgo,
 “ procurator rite et legitime constitutus in
 “ nomine

“ nomine dicti B, ut mihi Notario publico
 “ subscribenti, per ipsius procurationis literas,
 “ contentas in contractu matrimoniali, imito
 “ et confecto inter illum et C ejus filium, ex
 “ parte una, et D filiam legitimam E, unius
 “ balivorum burgi de —, cum consensu
 “ dicti E sui patris, ex parte altera, prout in
 “ dicto contractu matrimoniali, super fundum
 “ dictorum tenementorum terrarumque pro-
 “ ducto et perlecto, de data —, lucide
 “ constabat, totum et integrum,” &c. [Here
 repeat your lands, as above, and then add],
 “ jacens in dicto burgo de —, et bonda-
 “ tum modo superscripto; per fustis et bacu-
 “ li deliberationem, in manus dicti balivi sur-
 “ sum reddidit, pureque et simpliciter resi-
 “ gnavit: reservans dicti B et H ejus sponsae
 “ vitales redditus dimidii tenementorum ter-
 “ rarum aliorumque superscriptorum, duran-
 “ tibus omnibus eorum vitae diebus. Qui-
 “ bus resignationibus sic rite et legitime per
 “ se et separatim factis et admissis, dictus ba-
 “ livus, virtute et vigore,” &c. [as above;
 and after the words, “ pariter et iassinam,”
 add], “ hereditariam, totius et integri dicti
 “ tenementi terrae, olim,” &c. [Here the
 several tenements must be repeated, and then
 say], “ jacentis in dicto burgo, et bondati ut
 “ praedicatur, per terrae et lapidis fundi di-
 “ ctorum tenementorum terrarumque respe-
 “ ctive et successive traditionem, praefato C,
 “ personaliter praesenti et acceptanti, contu-
 “ lit, exhibuit, et deliberavit: reservans dicto

“ B ejusque sponsae, eorumque diutius viven-
 “ ti, vitales redditus dimidii tenementorum
 “ terrarumque, durantibus omnibus eorum
 “ vitae diebus. Et sine mora praefatus A,
 “ procurator rite et legitime constitutus in
 “ nomine dicti C, ut mihi Notario publico
 “ subscribenti, per ipsius procurationis literas,
 “ etiam in dicto contractu matrimoniali, de
 “ data antedicta, contentas, lucide constabat,
 “ totam et integram justam et aequalem di-
 “ midietatem dictorum tenementorum, ter-
 “ rarum aliorumque superscriptorum, cum
 “ pertinentibus, jacentium et bondatorum ut
 “ praedicitur, per fustis et baculi deliberati-
 “ onem, in manus dicti balivi sursum reddi-
 “ dit, pureque et simpliciter resignavit. Qui-
 “ bus resignationibus,” &c. [as above; and
 then, after the words, “ pariter et fasinam,”
 add], “ vitalis redditus totius et integrae
 “ justae et aequalis dimidietatis tenemento-
 “ rum, terrarum aliorumque superscriptorum
 “ respective et successive traditionem, A, tan-
 “ quam attornato, et in nomine dictae D,
 “ sponsae dicti C, durantibus omnibus suae
 “ vitae diebus, contulit, exhibuit, et, secun-
 “ dum tenorem dicti contractus matrimoni-
 “ alis, dedit pariter et deliberavit: salvo jure
 “ cujuscunque. Super quibus omnibus et sin-
 “ gulis praemissis, praefatus C, pro seipso,
 “ nec non dictus A, tanquam attornatus, et
 “ in nomine dictae D, a me Notario publico
 “ ipsis fieri petierunt hoc praesens publicum
 “ instrumentum, seu plura publica instrumen-

“ ta,

Tit. III. *Of Seifins in Burgage-tenements.* 111

“ta. Acta erant,” &c. [*ut supra, in communi forma.*]

When the magistrates of a burgh-royal are charged with letters of horning to infest an adjudger, they seldom or never disobey the charge, but give seifin forthwith; which will be the same as in the first, to these words, “et ibidem dictus balivus, virtute et vigore sui officii,” and then add, “et in obedientiam quarundem literarum S. D. N. Regis, impetratarum super quoddam decretum adjudicationis, coram Dominos Concilii et Sessionis, — die — mensis ultimo elapsi, obtentum, ad instantiam N de —, contra O de —, pro solutione et satisfactione ei summarum monetae principalium, annuorum reddituum, et liquiditatarum expensarum inibi contentarum, extendentium in integrum, ad datam dicti decreti adjudicationis, ad summam ducentarum mercarum monetae Scotiae, salvo justo calculo, contra praepositum et baliyos dicti burgi de —, ipsis praecipientium et mandantium, ut praenominatum N, ejusque heredes et assignatos, in toto et integro” [Here take in the lands as designed and bounded in the decret of adjudication, and then say], “hereditarie infeodarent, sub poena rebellionis et cornu-positionis; prout in dictis literis S. D. N. Regis, executionibusque et indorstationibus earundem, de data sub signeto regio — die mensis — et anno —, latius continetur, statum, possessionem corporalem,

“ poralem, actualem, realem, pariter et fa-
 “ sinam hereditariam, totius et integri dicti
 “ tenementi terrae, olim,” &c. [Here take
 in the tenements as designed and bounded,
 and then add], “ jacentis in dicto burgo de
 “ ———, et bondati ut praedicitur; per ter-
 “ rae et lapidis fundi dicti tenementi terrae
 “ deliberationem, praefato N, personaliter
 “ praesenti et acceptanti, contulit, exhibuit,
 “ et, secundum tenorem dictarum literarum
 “ S. D. N. Regis, dedit, tradidit, pariterque
 “ deliberavit: salvo jure cujuslibet (a). Super
 “ quibus,” &c.

T I T L E IV.

Of the warrants of seisin.

HAVING already said that I should treat
 more fully of the warrant upon which
 seisin proceeds, I shall here present the reader
 with some of the most ordinary models for
 narrating such warrants of seisin as are written
 either in Latin or English. And as this clause
 admits of a greater variety than any other in
 the whole instrument, because every particu-
 lar warrant upon which seisin proceeds hath
 something or other peculiar to it self in the

(a) Here may be added, *redimabili omni modo dicto
 tenemento terrae a praefato N ejusque praedictis, per dictum
 & ejusque praedictos, secundum actum parliamenti.*

narrating of it, it is proper to observe, that the following narratives are not set down so as the same may be constantly followed; but it is left to the prudent Notary to adapt the narrative to the nature of the infestment he is to take, making use of these only by way of example in the like cases.

Narrative of a precept on a retour.

—— *Habens, et in suis manibus tenens, quoddam praeceptum sasinæ pergamena scriptum, et cancellario dicti S. D. N. Regis directum, pro sasinâ et possessione danda prænominato A, nunc de ——, tanquam legitimo et propinquiore heredi masculo quondam D de —— sui patris, totarum et integrarum terrarum, decimarum aliorumque subscriptorum, cum pertinentibus.*

Narrative of a precept of Clare constat.

—— *Habens, &c. dictum praeceptum sasinæ, (vulgo praeceptum de Clare constat vocatum), factum et concessum per honorabilem virum A de ——, in favorem dicti B de ——, tanquam heredis dicti quondam de —— sui patris, de totis et integris terris, annuo redditu aliisque subscriptis, de data, tenore, et contentis subscriptis.*

If the precept be in English, as they sometimes are, the narrative will be thus:

—— *Having, &c. the said precept of seisin,*
K 3
commonly:

commonly called a precept of *Clare constat*, made and granted by an honourable gentlemen *A* of —, in favour of the said *B* of —, as heir to the said umquhile *D* of — his father, of all and haill the lands, annualrent, and others under written, of the date, tenor, and contents after mentioned.

Narrative of a charter.

— *Habens, &c. quandam chartam resignationis sub magno sigillo, continentem in fine ejusdem preceptum sasinae subtus mentionatum, factum, datum, et concessum, per dictum S. D. N. Regem, praedicto A de —, et heredibus suis masculis de ejus corpore, [Here insert the tailzie and substitution as in the charter], de data subtus mentionata. Per quamquidem chartam (pro causis inibi specificatis) dictus S. D. N. cum avisamento et consensu Domini Capitalis Baronis et reliquorum Dominorum Baronum Scaccarii S. D. N. Regis, in hac parte regni Magnae Britanniae Scotia vocata, [and, if there be any provisions, say, et cum et sub provisionibus, conditionibus, reversionibus, et limitationibus inibi et postea specificatis], dedit, concessit, et disposuit, ac pro perpetuo confirmavit, praefato A heredibusque suis masculis de ejus corpore, quibus deficientibus, heredibus suis et assignatis quibuscunque, hereditarie et irredimabiliter, absque quavis reversione, redemptione, aut regressu, in perpetuum, totas et integras [Here insert the lands verbatim, and then say], una cum omni jure, &c. [and then, if there be any provisions, say],*

say], *et hoc cum et sub reversionibus, reservationibus, restrictionibus, provisionibus, conditionibus, oneribus, qualificationibus, et limitationibus omni modo subscriptis, viz.* [Here insert the provisions as in the chapter, and thereafter the *Quaequidem* ; then say], *et dictus S. D. N. Rex, (pro causis inibi specificatis), cum avisamento et consensu praedicto, de novo dedit, concessit, et disposuit, praefato A, et heredibus suis masculis de ejus corpore, quibus deficientibus, heredibus suis et assignatis quibuscunque, totas et integras terras, decimas, molendinas, salmonum piscinas, baronias, castra, turres, fortalicia aliaque particulariter superscripta : Tenendas de dicto S. D. N. Rege, modo in dicta charta amplius mentionato et contento ; prout eadem, continens clausulam disjunctionis terrarum, decimarum, salmonum piscinarum, molendinarum aliorumque superscriptorum, ab omnibus aliis dominiis, baroniis aliisque, quibus ante annexa fuerunt, et unionis, erectionis, creationis, et incorporationis earundem, in unam integram et liberam baroniam, vocandam omni futuro tempore baroniam de — ; et ordinans dictum manerii locum de — principale fore messuagium ejusdem, et unicam salsinam ibidem, vel super quamlibet partem dictarum terrarum, capiendam, per traditionem terrae et lapidis fundi earum solummodo, absque necessitate utendi quibuscunque aliis symbolis, validam et sufficientem fore salsinam, pro integris terris, decimis, salmonum piscinis aliisque superscriptis ; et hoc non obstante quod eadem minime contigua sint, sed in diversis locis jaceant ; ut eadem, inquam, latius proportionat.*

Narrative

Narrative of a charter of adjudication.

“ — Habens, &c. quandam chartam ad-
 “ judicationis sub magno sigillo, continentem
 “ in fine ejusdam praeceptum fassinae subscri-
 “ ptum, factum, datum, et concessum, per
 “ dictum S. D. N. Regem, praefato A, here-
 “ dibus suis et assignatis quibuscunque. Per
 “ quamquidem chartam (pro causis inibi spe-
 “ cificatis) dictus S. D. N. Rex, cum avisa-
 “ mento et consensu, &c.” [As in the nar-
 “ rative of a charter], “ et cum et sub provi-
 “ sione et reversione inibi mentionatis, dedit,
 “ concessit, et disposuit, praefato A, heredibus
 “ suis et assignatis praedictis, hereditarie, to-
 “ tas et integras, &c.” [Here insert the lands;
 then say], “ redimabiles omni modo et sub
 “ reversione, et sub et cum provisiōe et con-
 “ ditione in dicta charta contentis,” [and
 thereafter insert the *Quaequidem*; then say],
 “ prout dicta charta, de data subtus mentio-
 “ nata, continens dictum fassinae praeceptum,
 “ una cum dispensatione pro unica capienda
 “ fassina apud dictum manerii locum de —,
 “ vel super quamlibet partem terrarum alio-
 “ rumque superscriptorum, et declarans ean-
 “ dem validam, sufficientem, et efficacem fore,
 “ pro integris terris, decimis aliisque supra-
 “ scriptis, &c.”

Or thus if granted by a subject superior.

— Having, &c. an charter of adjudication
 granted

granted by a Noble Lord —, in favour of A, his heirs and assignees whatsoever ; containing, in the end thereof, the precept of seisin under written : whereby (for the causes therein specified) the said Noble Lord, with and under the provision and reservation therein mentioned, gave, granted, and disposed to the said —, his heirs and assignees foresaid, heritably, all and hail [*Here take in the lands ; then say*], redeemable always, and under reservation, and with and under the condition and provision contained in the said charter, [*Thereafter insert the Quaequidem ; then say*], as the said charter, of the date after mentioned, containing the foresaid precept of seisin, at more length propoerts.

Narrative of a charter from a subject.

“ — Habens, &c. quandam chartam, de
 “ data subtus mentionata, factam, datam, et
 “ concessam, per dictum A de —, in fa-
 “ vorem praefati B, heredumque suorum et
 “ assignatorum inibi mentionatorum, heredi-
 “ tarie et irredimabiliter. Per quamquidem
 “ chartam, dictus A (pro causis inibi speci-
 “ ficatis) dedit, concessit, et disposuit, praedi-
 “ cto B, heredibus suis et assignatis inibi con-
 “ tentis, hereditarie et irredimabiliter, ut di-
 “ ctum est, totas et integras” [*Here insert
 the lands, with the Quaequidem, and provi-
 sions, if any be ; then say*], “ prout dicta
 “ charta,

“ charta, inibi continens fasinae praeceptum
 “ subtus mentionatum, latius proportat.”

In English thus.

— Having, &c. an charter, of the date after mentioned, made and granted by the said *A* of —, to and in favour of the said *B*, his heirs and assignees therein mentioned, heritably and irredeemably : whereby (for the causes therein specified) the said *A* gave, granted, and disposed, to the said *B*, his heirs and assignees therein mentioned, heritably and irredeemably, as said is, all and hail [Here insert the lands, with the Quaequidem, and provisions, if any be ; then say], as the said charter, of the date under written, containing the precept of seisin therein and after mentioned, at more length proports.

A charter upon a contract of wadset will differ nothing from the above, except, in place of the words, *heritably and irredeemably*, you must insert, *heritably and under reversion in manner therein mentioned* ; and in the conclusion of the narrative, to add these words, *as the said charter, of the date under written, whereby the lands and others above written, are declared to be redeemable in manner therein mentioned, &c.*

Narrative of a disposition of lands.

— Having, &c. an disposition, of the date —, and containing the precept of seisin after

ter

ter mentioned, made and granted by the said *A* of —, to and in favour of the said *B* : whereby (for the causes therein specified) the said *A* sold, annailzied, and dispoⁿed, from him, his heirs, and all other his assignees, to and in favour of the said *B*, his heirs and assignees whatsoever, heritably and irredeemably, but any manner of reversion, redemption, or regrefs whatsoever, all and hail [Here insert the lands ; then say], lying within the parochin of — and sheriffdom of —, together with all right, title, interest, claim of right, property and possession petitor and possessor, which the said *A*, or his predecessors and authors, heirs and successors, had, have, or any wise may claim or pretend to the lands and others above written, or to any part or portion thereof, or to the mails, farms, profits, and duties thereof, in all time coming ; [and, if there be any provisions, add these words], with and under the provisions, &c. after mentioned, viz. [Here insert the provisions ; then say], as the said disposition, of the date above written, containing obligation to infest by double infestments, and two several manners of holding, *a me* and *de me*, with procuratory of resignation, clause of absolute warrandice, assignation to the mails and duties, writs and evidents, with the precept of seisin after inserted, and several other usual clauses, at more length propo^rts.

Narrative

Narrative of a disposition of annualrent.

— Having, &c. an disposition, of the date —, and containing the precept of seisin after specified, made and granted by the said *A* of —, to and in favour of the said *B*; whereby (for the causes therein specified) the said *A* sold, alienated, and disposed from him, his heirs, and all others his assignees whatsoever, all and haill an annualrent of —, or such an annualrent as shall be due for, and agreeable to the principal sum of —, by the laws and acts of parliament of this kingdom for the time, yearly to be uplifted and taken at two terms in the year, Whitsunday, and Martinmas in winter, be equal portions, forth of all and haill [*Here insert the lands*], lying within the parochin of — and sheriffdom of —, or forth of any lands or heritages whatsoever pertaining and belonging to *C*, where-ever the famen lie, within this kingdom, or forth of any part or portion thereof, first, best, and readiest mails, farms, profits, and duties of the famen, specified and contained in an heritable bond granted by the said *C*, in favour of the said *A*, of the date the —, registrate in —, and in the said *A* his seisin following thereon, dated the — day of —, duly registrate conform to the act of parliament; together with all right, title, interest, claim of right, property and possession petitor and possessor, which the said *A* or his heirs and successors,

successors, have, or any wise may have, claim, or pretend to the foresaid annualrent, or to any portion thereof, in time coming : providing always the said annualrent be redeemable by the said C and his forefairs, conform to the clause of reversion contained in the said heritable bond ; as the said disposition, containing an obligation to invest, procuratory of resignation, assignation to the principal sum of —, whereupon the said annualrent is redeemable, and to the said heritable bond, and seisin following thereon, also containing the precept of seisin after inserted, at more length propoerts.

Narrative of an heritable bond.

— Having, &c. an heritable bond, of the date —, and containing the precept of seisin after inserted, made and granted by the said A (a), to and in favour of the said B, and his heirs and successors after mentioned : whereby (for the causes therein specified) the said A bound and obliged him, his heirs and successors, with all convenient diligence, upon his own proper charges and expenses, to duly, validly, and sufficiently invest, vest, and seise the said B, his heirs and assignees whatsoever, heritably, and under reversion in

(a) If there be cautioners in the heritable bond, add these words, “ as principal, and — and — as cautioners, soverties for and with him, conjunctly and severally.”

L

manner

manner after mentioned, in all and haill an annualrent of — Scots money, or such an annualrent as should be due for, or correspond and be agreeable to the principal sum of — money foresaid, by the laws and acts of parliament of this kingdom for the time, yearly to be taken at two terms in the year, Whitsunday, and Martinmas in winter, be equal portions, forth of all and haill the said *A* his lands of [*Here insert the lands*], lying within the parochin of — and sheriffdom of —, or forth of any other lands or heritages pertaining and belonging to the said *A*, where-ever the same lie, within this kingdom, or forth of any part or portion thereof, first, best, and readiest mails, farms, profits, and duties of the same; as the said heritable bond, of the date foresaid, containing procuratory of resignation, obligation by the said *A* to the said *B* and his foresaids, for payment making to them of the foresaid annualrent, they as well not inest as inest, at the said two terms in the year, be equal portions, as said is, beginning the first term's payment thereof at the term of Martinmas next to come, for the first half-year preceding, and so forth yearly and termly during the not redemption; with an clause of reversion, whereby the said annualrent is redeemable upon payment or configuration of the foresaid principal sum, in manner, and upon the premonition therein mentioned; together also with an clause of absolute warandice, and precept of seisin after specified,
with

with several other usual clauses, at more length proports.

Narrative of a contract of feu.

— Having, &c. an contract of feu and alienation, made and passed betwixt *A* and *B* on the one and other parts, of the date —, containing the precept of seisin after inserted: whereby (for the causes therein specified) the said *A* sold, annailzied, and disposed, and in feu-farm and heritage did let and demit, to the said *B*, his heirs and assignees whatsoever, heritably and irredeemably, but any manner of reversion, redemption, or regrefs for ever, [*If there be any provisions, add, with and under the provisions and conditions after mentioned*], all and haill [*Here insert the lands*], lying within the parochin of — and sheriffdom of —, together with all right, &c. which the said *A*, or his predecessors, authors, heirs, and successors, had, have, or any wise may have, claim, or pretend, to the lands and others above written, with the pertinents, or any part or portion thereof, or to the mails, farms, profits, and duties of the same, in time coming; [*If there be any provisions, add*], and that with and under the provisions and conditions after mentioned, viz. [*Here insert the provisions; then say*]; as the said contract of alienation and feu, containing therein obligation to infest, clause of absolute warrandice and precept of

feisin under written, with several other clauses, at more length propoerts.

Narrative of a contract of wadset.

—— Having, &c. an contract of wadset, made and passed betwixt the said *A* and *B* on the one and other parts, of the date ——, and containing the precept of feisin under written : whereby (for the causes therein specified) the said *A* fold, annailzied, wadset, impignorated, and dispoened, from him, his heirs, and all others his assignees, heritably, and under reversion, in manner therein and after mentioned, [*If there be any provisions, say, and with and under the provisions, &c. under written*], all and hail [Here insert the lands], lying within the parochin of —— and sheriffdom of ——, with all right, title, interest, claim of right, &c. which the said *A*, his authors and predecessors, their heirs and successors, had, have, or any wise may have, claim, or pretend, to the lands and others above written, with the pertinents, or to any part or portion thereof, or to the mails, farms, profits, and duties of the same, in all time coming during the not redemption : providing always, that the said lands and others above written be redeemable be the said *A*, from the said *B* and his forefaids, by payment or consignation of the sum of —— Scots money, upon the premonition in manner, and conform to the clause of reversion specified and contained in the

the said contract of wadset, [*Or you may narrate the clause of reversion at length, and then say, if there be any provisions*], and with and under the special provisions, &c. after specified, viz. [*Here insert the provisions*]; as the said contract, of the date foresaid, containing therein an obligation to infest, by double infestments, and two manners of holding, *a me* and *de me*, with procuratory of resignation, clause of absolute warrandice, assignation to the mails and duties, writs and evidents, during the not redemption, with the precept of seisin after inserted, and several other clauses, at more length propoerts.

Narrative of a contract of marriage.

—— Having, &c. an contract of marriage, made and passed betwixt the said *A*, with the special advice and consent of *B* his father, and the said *B* for himself, and as taking burden in and upon him for his said son, and them both with one advice and consent, on the one part; and the said *C*, with the special advice and consent of *D* her father, and the said *D* for himself, and as taking burden in and upon him for his said daughter, and them both with one advice and consent, on the other part, of the date ———, and containing the precept of seisin under written: whereby (for the causes therein specified) the said *A*, with advice and consent of his said father, and the said *B* for himself, his own right and interest,

terest, and taking burden on him for his said son, and they both with one advice, consent, and assent, bind and oblige them, their heirs and successors, with all convenient diligence, and upon their own proper charges and expenses, to duly, validly, and sufficiently infeft and seise the said C, his said spouse, for her life-rent-usage, during all the days of her lifetime after his decease; [*and if there be any provisions, say*], and with and under the provisions and conditions therein and after mentioned, in all and haill [*Here insert the lands, or annuity upliftable forth thereof, as in the obligation to infeft, verbatim*], and that by two kinds of infeftments, *a me vel de me*, in manner at length mentioned and contained in the said contract-matrimonial; as the samen, of the date foresaid, containing therein procuratory of resignation, clause of absolute warrandice, precept of seisin under written, and several other clauses, at more length propoerts.

Nota, That sometimes the disposition, contract, or charter, is made, with consent of parties having interest, in favour of a person and his wife in conjunct fee: the form whereof is here set down.

Narrative of a right made with consent of parties.

———— Having, &c. an disposition, of the date ———, and containing the precept of seisin under written, made and granted by the
said

faid *A*, with the fpecial advice of *B* his father and *C* his mother, for all right of liferent, conjunct fee, terce, or other right whatfomever, which they, or either of them, have or can pretend to the lands and others after fpecified, or to any part or portion thereof, or to any annualrent or annuity upliftable forth of the famen, or to the mails, farms, profits, and duties thereof, in time coming, in favour of the faid *A*, and *D* his fpoufe, and longeft liver of them two, in conjunct fee and liferent, and to *E*, their eldeft lawful fon, and the heirs-male of his body, in fee ; which failing, to *F*, their fecond lawful fon, and the heirs-male of his body ; which failing, to the other heirs-male procreate or to be procreate of the faid *A* his body ; which alfo failing, to his other near-efteemed lawful heirs and affignees whatfomever : whereby (for the caufes therein fpecified) the faid *A*, with advice and confent of the faid *B* his father and *C* his mother, for their refpective rights and interefts above mentioned, and the faid *B* and *C* for themfelves, their own rights and interefts, and all of them with one confent and affent, fold, annailzied, and difpofed, to and in favour of himfelf, and *D* his faid fpoufe, and longeft liver of them two, in conjunct fee and liferent, and to the faid *E*, &c. [*as above*], heritably and irredeemably, with and under the provifions and conditions under written, all and hail, &c.

T I T L E

T I T L E V.

Of Instruments of Resignation.

HAVING in the three foregoing titles amply treated of instruments of seisin, I come now to discourse of instruments of resignation : which are twofold ; either *ad perpetuam remanentiam*, or *in favorem*.

Resignation *ad perpetuam remanentiam* is, a delivery or resigning of the lands into the hands of the superior himself, or one commissioned by him, so as that the right of property may be united and consolidate with the right of superiority.

Resignation *in favorem* is likewise, a resigning of the lands into the hands of the superior ; but not so as to consolidate the right of property with that of the superiority ; for here the fee is not extinct, but either renewed or transferred.

Resignations *ad perpetuam remanentiam*, being an extinction of the vassal's infeftment, must be perfected by an instrument of resignation in the hands of a Notary ; which no other writ, nor acknowledgment of the vassal, nor any deed done otherwise, can prove or supply such an instrument : wherefore this sort of resignation is completed by the instrument of resignation itself alone. And after this resignation is made, the superior's simple renunciation or discharge thereof cannot re-
vive

vive the vassal's prior infeftment, but he must be infeft *de novo*.

Resignations *in favorem* must consist of three parts: 1. The renunciation of the party-resigner in favour of a third party; 2. The acceptance of the superior; 3. The delivery and investiture made to him in whose favour the resignation was granted. Nor is the first of these of any force or effect, unless the others follow and are completed: for if the person who resigns the lands, shall make two several resignations at different times, he who is first infeft, although by virtue of the last resignation, will be preferred.

Craig, lib. 3. dig. 1. § 17. & 18. gives this as his opinion; although he shews that it was otherwise decided in the case of a burghers in Perth, who making a second resignation in favour of his son, though twenty years after the first, the last resignation was found null, as granted by one who had already divested himself of all right he had to the lands, by a former resignation, albeit the person in whose favour the first resignation was granted, had not completed his right by infeftment; and adds, that before this decision it was never doubted by our ancestors, but that, in the case of two several resignations, he who obtained the first seisin would be preferred. And this seems to be supported by what my Lord Stair says upon this head in his *Institutions, lib. 3. tit. 1. § 12.* and by a later decision there cited, observed by Durie, *p. 225.* where one
having

having disposed his lands, and resigned the same in favour of the purchaser, thereafter the seller disposes the same lands to another; who, after the procuratory of resignation, takes seisin before him who acquired the first alienation; and by virtue of his first seisin, he who acquired the second right becomes in possession of the lands. And albeit it was pled, in support of the first right, that his seisin, although a short space after the other's, ought to be drawn back to the date of the preceding procuratory of resignation; and that the possession ought not to be respected, in regard it was but a year past since the first of their rights was made, and there were few weeks betwixt the dates of their seisins: notwithstanding, the prior seisin was sustained, albeit it was a base infeftment granted to be holden of the annailzier, and the other a public infeftment, proceeding upon resignation, to be holden of the superior. And in a double poinding, Thomson *contra* Kilgour, 24th January 1628, observed by Durie; where Thomson's right depended upon a procuratory of resignation made in his favour by Kilgour's author, for infeftment to be given to him of an annualrent, divers years before the heritable right made to Kilgour; to the which date of the said preceding procuratory he alledged that his seisin should be drawn back, and that he should be preferred to Kilgour; especially seeing, since the said procuratory, he had uplifted the mails
and

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and duties of the lands for satisfying of his said annualrent divers years, which ought to corroborate his right in this possessory judgment; seeing also that his seisin, which depended upon that procuratory, was but four days after Kilgour's seisin: notwithstanding whereof, the Lords preferred Kilgour. For a further illustration of this head, see Sir James Stewart's *answers to Dirleton's doubts*, p. 262. & 263. as also Mackenzie's *institutions*, b. 2. tit. 7. § 17. where he tells us, That the first infeftment upon the second resignation, will be preferred to him who has but the second infeftment upon the first resignation. See *act* 105. *parl.* 7. Ja. V. and *act* 140. *parl.* 12. Ja. VI. and Mackenzie's *criminals*, tit. 28. where you will find that superiors were punishable who received double resignations.

Resignation then being either an extinction, when it is granted to the superior, *ad perpetuam remanentiam*; or a renewal, when the vassal resigns the lands for new infeftment to be granted to himself, as, when lands hold ward, the vassal perhaps resigns them so as they may be returned blench, or the like; or a transference of the fee, when the lands are resigned in favour of an assignee; there are some solemnities necessary to the completing thereof: and, as I cannot better oblige such of my readers as have not opportunity of consulting our law-books upon this head, I shall here present them with the most material solemnities,

lemnities, as they are in my Lord Stair's *Institutions*.

Resignation must proceed upon a disposition, or procuratory of resignation having in it the effects of a disposition; for the instrument of resignation being but the assertion of a Notary, will not be sufficient alone without an adminicle in writ. Of these procuratories *per se*, an example shall be given in the title upon *procuratories*.

The second step in resignation is, the act of resignation itself: which necessarily must be by way of instrument of a Notary, expressing the warrant of it, *viz.* the disposition, if it be done by the resigner *propriis manibus*; or the procuratory, if it be done by a procurator; and that, conform thereto, the resigner, or procurator compeared personally before the superior, or his commissioner having special warrant to receive resignation; and that the resignation was made in the hands of the superior by staff and baston delivered by the resigner, or his procurator, to the superior, as the token or symbol of the thing resigned; and that the same was accepted and received by the superior, or his commissioners, by taking the said symbol in their hands, for new investment to be given to the acquirers. This resignation is made by the vassal, or his procurator, on their knees; and accordingly is in the instrument said to be done with all humility: and that the superior, or his commissioner, delivered the staff as the symbol of the
fee

fee to the acquirer ; which is also expressed in the instrument.

The solemnities of resignation are so effectual and necessary, that the omission of any of them annulleth the resignation: and therefore renunciation without a formal resignation, though it may be sufficient against the renouncer, yet it is not sufficient to take away infestment renounced, against singular successors; nor can it constitute any real right in the person of the acquirer, unless he had *aliunde* another standing right in his person. And the reason is, Because *jura eodem modo destituuntur quo constituuntur*; and therefore, as infestments cannot be constitute without an instrument of seisin, so they cannot be destitute without an instrument of resignation, or at least another instrument of seisin with the superior's confirmation. Instruments of seisin and resignation have a resemblance and coherence together in several essentials, *viz.* as seisin may be given either to the vassal or his procurator, so may the resignation be either to the superior, or his commissioners authorised for that effect. And though instruments of resignation use to be by procurators warranted by a procuratory of resignation; yet, as there may be seisins given by the superior *propriis manibus*, so may there be resignations by the vassal. And likewise they agree in this, that neither an instrument of seisin nor resignation are sufficient without a warrant or adminicle in writ; and therefore, by *acts* 38. *parl.* 6. and 81. *parl.* 16.

Q. Mary, it is statute, That in all resignations *ad perpetuam remanentiam* made by procuratories, the said procuratory shall be subscribed by the vassal; and if he cannot write, must be subscribed with his hand at the pen led by an authentic Notary: and if the resignation be made by the vassal personally, the instrument must be subscribed by him; and if he cannot write, must be subscribed with his hand at the pen led by a Notary in manner foresaid; and that no resignation *ad remanentiam* is to have strength in times to come, otherwise than as above specified.

The reason that the parties, as well as the Notary, subscribe the instrument, is, Because the subscription of the instrument is in that case the only probation of the warrant thereof: but if there be a disposition or obligation to infest, the instrument of resignation, though not subscribed by the resigner, will be sufficient, as warranted by the disposition or obligation: as also, by *act 5. parl. 3. Ch. II.* all instruments of resignation, as well as those of feisin, must be subscribed by the witnesses inserted and designed, otherwise they are declared null; see *p. 54.*

But still there is a material difference betwixt instruments of feisin and resignation. For feisin must necessarily be taken upon the ground of the lands, naturally or by union; but resignation may be given and taken any where, although not upon the ground of the lands. As also they formerly differed with
respect

respect to the registration: for there was no legal necessity for the registration of resignations, until that by *act 3. parl. 2. Ch. II.* it was statute, That instruments of resignation *ad remanentiam* be registrate within sixty days after the date thereof, in the same way and manner as renunciations, feifins, or reversions; otherwise the said resignation to be null: but instruments of resignation of tenements, lands, and fishings, holden in free burghage, being registrate in the town-court books of the burgh, do not fall under the certification of this act.

The parliament 1693. considering that procuratories of resignation do by the death of the granter become void, whereby, for obtaining the same renewed, unnecessary expense is occasioned; for preventing thereof, by the 35th act of that parliament it is statute, That procuratories of resignation, granted or to be granted, shall be sufficient warrants for making resignation in favour of the receiver himself, or of his heir retoured on a general service, or of his assignee by disposition and assignation, or by adjudication, as well after, as it would have been before the death of the granter, provided the instrument taken upon the resignation made after the granter's death mention, and therein deduce the title of the person in whose favour it is made; otherwise to be null. Upon the whole, the solemnities of instruments of resignation may be comprehended under the following heads.

1. All instruments of resignation having the common beginning, must bear the date, as instruments of seisin.

2. That in the presence of the superior himself, or a full number of his commissioners convened, and in presence of the Notary and witnesses, compeared personally a procurator, mentioned in the procuratory of resignation.

3. That the procurator resigned the lands (here to be particularly mentioned) in the hands of the superior, or his commissioners, in favour and under what reservations, as in the procuratory; and that by warrant of a procuratory contained in such a writ, passed betwixt such and such persons, dated —, and that this resignation was made, by deliverance of staff and baston (as a symbol) in the hands of the superior, or one of his commissioners in name of the rest.

4. That the superior, or his commissioners in his name, accepted the resignation, and gave, granted, and disposed the lands (here mentioned in general) to the persons in the procuratory, conform to a charter to be made thereupon; and that by redelivering the foresaid staff and baston, which is the symbol.

5. That the procurator took instruments in the Notary-public's hands.

The rest as in instruments of seisin.

Instrument

Instrument of resignation of lands by one in the king's hands, in favour of himself and his heirs, with a reservation of his lady's life-rent.

IN the name of God, *Amen.* Be it known to all men, by this present public instrument, That, upon the twentieth day of December, one thousand seven hundred and thirty-nine years, and of the reign of our Sovereign Lord George the Second, by the grace of God King of Great Britain, France, and Ireland, defender of the faith, the thirteenth year, in presence of the Right Honourable *L*, Esquire, Lord Chief Baron, and remanent Barons of his Majesty's court of exchequer, in that part of Great Britain called Scotland, having full power and commission from his Highness to receive resignations of lands and others within Scotland (holden of his Majesty) in his Highness's name, and grant new infeftments thereupon, being convened in full number in the exchequer-house within the burgh of Edinburgh, where the said Lords are accustomed to meet and sit in exchequer, and in presence of me Notar-public subscribing, and witnesses after nominate, compeared personally *P*, one of the ordinary macers before the said court of exchequer, as procurator specially constitute by *A* of —, heritable proprietor of the lands and others after mentioned, by his procuratory of resignation

M 3

gnation after written, to the effect after specified: and there the said *P*, procurator fore-said, with all humility and condign reverence as became him, resigned, surrendered, up-gave, overgave, and delivered, all and haill [*Here insert the lands*], together with all right, title, interest, claim of right, property, and possession petitor and possessor, which the said *A*, his heirs and assignees, had, hath, or any wise might claim or pretend thereto, or to any part thereof, in the hands of the said Lords Barons of Exchequer, as in the hands of his Majesty, immediate lawful superior thereof; in favour and for new infeftment of the samen to be made and granted to the said *A* his heirs-male lawfully procreate or to be procreate of his own body, and the heirs whatsoever lawfully to be procreate of their bodies; whom failing, to the heirs-female procreate or to be procreate of the said *A* his body, and the heirs of their bodies; the eldest heir-female always succeeding without division, and being always obliged to marry a gentleman of the surname of *A*, or of any other surname, who, and the heirs to be procreate betwixt them, shall successively and perpetually, in all time thereafter, be obliged to take upon them, retain, use, and carry the arms and surname of *A*; wherein if they fail, they shall amit and tine all benefit of the lands, barony, and others above mentioned, both principal and warrandice, and the same shall accresce and pertain to his next apparent heir

heir of tailzie, who shall have right to the lands and others above specified, sicklike as if the party failing had never been infest therein, nor had right thereto, and shall have power to pursue actions of reduction, declarators, adjudications, and all other actions necessary for establishing the rights of the lands and others above written in their persons, upon the foresaid contravention: and failing of heirs-female of the said *A* his own body, then to any person or persons that he hath already, or shall, now, or at any time hereafter, nominate, design, or appoint his heir or heirs of tailzie, by a writ under his hand, to succeed to his lands, barony, and others above rehearsed; and under such provisions, restrictions, and qualifications, as shall be contained therein, which the persons so to be nominated shall be holden to perform and fulfil: and failing of such a nomination, or the samen being made, and thereafter revoked or cancelled by him, (which shall always be in his power during his lifetime); then to his nearest heirs or assignees whatsoever, heritably and irredeemably, in due and competent form: providing always, that the said heirs, as well male as female, of his own body, as the heirs to be contained in the said nomination, shall be obliged and liable, likeas, by acceptation of the infestment to follow hereupon, they oblige themselves to perform and fulfil the haill obligements, qualifications, restrictions, and reservations, mentioned in a bond
of

of provision granted by him, of the date —, and relative to the foresaid procuratory of resignation, and for fulfilling whereof the said procuratory is granted: reserving always to *B*, spouse to the said *A*, her liferent of the foresaid lands, and that in lieu and place, and in full contentation and satisfaction to her, of all whereunto she is provided by her contract of marriage, as is expressly mentioned in the disposition of the said lands and barony, made by — to the said *A*, and charter following thereupon; which contract of marriage the said *B*, spouse to the said *A*, by acceptance of the liferent-infestment foresaid, hereby reserved to her, doth *simpliciter* and absolutely discharge: by virtue of, and conform to a procuratory of resignation made by the said *A*, in favour of himself and his heirs and successors above written, of the date at —, the — day of —, for resigning the lands, barony, and others above mentioned, in manner, and to the effect above specified; and that by deliverance made by the said *P*, procurator foresaid, of staff and baston, as use is, in the hands of the said *L*, Lord Chief Baron of the foresaid court of exchequer, for himself, and in name and behalf of the remanent Lords thereof: which resignation being so made, as also accepted and received by the said *L*, Lord Chief Baron, for himself, and in name and behalf of the remanent Barons of exchequer, they have granted and disposed to the said *A*, and his above rehearsed, heritably and irredeemably,

irredeemably, the lands, barony, burgh of barony, and others above mentioned, conform to the charter to be made to them thereupon by his Majesty, under his great seal of the foresaid kingdom, with consent of the Lords Commissioners above expressed, in due and competent form; and that by deliverance by the said *L*, Lord Chief Baron, and that for himself, and in name and behalf above mentioned, of the foresaid staff and baston, as use is, in the hands of the said *P*, procurator above specified, personally present, and receiving the samen, as attorney for, and in name and behalf of the said *A*. Upon which haill premisses the said *P*, as attorney, and in name and behalf foresaid, asked and required instruments, ane or mae, of me Notar-public subscribing. Thir things were done within the foresaid exchequer-house in Edinburgh, between — and — hours in the forenoon, day, month, year of God, and of the king's reign *respectivè* above specified, in presence of *C*, *D*, *E*, and *F*, witnesses specially called and required to the premisses.

Instrument of resignation in favorem in the hands of the Barons of Exchequer, with several variations.

IN the name of God, *Amen*. Be it know to all men, by this present public instrument, That, upon the thirty-first day of December,

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one thousand seven hundred and thirty-nine years, and of the reign of our Sovereign Lord George the Second, by the grace of God King of Great Britain, France, and Ireland, defender of the faith, the thirteenth year, in presence (a) of the Right Honourable L, Esquire, Lord Chief Baron, and remanent Barons of his Majesty's court of exchequer, in that part of Great Britain called Scotland, his Majesty's commissioners, having full power and commission from his Highness to receive resignations of lands and others within Scotland (holden of his Majesty) in his Highness's name, and grant new infeftments thereupon, being fully convened in the exchequer-house within the burgh of Edinburgh, where the said Lords are accustomed to meet and sit in exchequer, and also in presence of me Notary-public and witnesses after mentioned, compared personally P, one of the ordinary officers before the said court of exchequer, as procurator for B of —, to the effect under written specially constitute, by his letters of

(a) But if a subject be superior of the lands, at the compearance, say, "in presence of A, an High and Mighty Prince, Duke of —, or an Most Noble and Potent Marquis of —, or a Noble and Potent Earl, or Noble Lord, &c. superior of the lands and others under written." But if resignation be made in the hands of a commissioner for a superior by special commission, in the compearance, say, "in presence of —, commissioner lawfully constitute by —, superior of the lands and others under written, conform to his special commission granted for that effect, of the date —."

procuratory

procuratory of resignation (*a*) after specified; and there, with such due reverence and humility as became, the said *P*, procurator fore-said, *genibus flexis*, by virtue of the said procuratory (*b*), purely and simply, by staff and

(*a*) If the disponent himself is not infest upon the procuratory in the disposition to him, in that case the procuratory must be particularly assigned whereby the purchaser may resign. Likewise, if the purchaser die before resignation follow in his favour, in that case, conform to *act 35. parl. 1693*, a general service gives the heir right to the procuratory of resignation, as also to the precept of seisin. In the first of these cases you must add, “ contained in the “ letters of alienation and disposition of the lands and o- “ thers under written, made and granted by the said *B*, “ then heritable proprietor thereof, to and in favour of *C*, “ his heirs or assignees, heritably and irredeemably, dated “ the ——— day of ——— years, and now assigned and “ disposed by the said *C*, to and in favour of *D*, conform “ to his disposition and assignation of the date the ——— day “ of ——— years.” And in the other case, say, “ contained in the letters of alienation and disposition, &c. “ to and in favour of the deceased ———, his heirs and as- “ signees, heritably and irredeemably, of the date ———, “ to whom *E*, now of ———, as heir served and retoured “ in general, conform to his retoured service, dated ———, “ has good and undoubted right to the lands and others “ contained in the disposition, and to the procuratory of “ resignation therein specified.” And if a subject be supe- rior of the lands, in place of *P* *one of the macers*, &c. in- sert the procurator’s name and designation, always obser- ving this where it occurs; but if resignation be made *pro- priis manibus*, the vassal or proprietor’s name is to be in- serted in place of the procurator’s.

(*b*) And in these two cases, where the purchaser is not infest, or dies before infestment, say, “ disposition [*or ge- “ neral service*] above specified, conform to the act of par- “ liament.”

baston,

bafton, as use is, renounced, resigned, surrendered, *simpliciter* upgave and overgave, from the said *A*, his heirs and assignees; (*a*) all and haill [*Here insert the lands as in the disposition and procuratory, and then say*], lying within the parochin of — and sheriffdom of —, together with all right, title, interest, claim of right, property, and possession whatsoever, which he and his predecessors and authors, their heirs and assignees, had, have, or any ways may have, claim or pretend thereto, or any part thereof, in time coming; (*b*) in the

(*a*) If the disposition or procuratory contain a tailzie, or provisions and irritant and resolute clauses, say, “with
 “ and under the special provisions, reservations, and reversions [*if any reversions be reserved to the granter of the*
 “ *right to redeem from the person in whose favour the*
 “ *same is granted*] after mentioned, allenarly, and no other ways.” If it is an annualrent that is resigned, add,
 “ all and haill an yearly annualrent of — Scots money,
 “ or any other annualrent which by any other supervenient
 “ law for the future shall be agreeable and correspond to
 “ the principal sum of — Scots money, borrowed and
 “ received by the said *A* from *H*, yearly to be uplifted
 “ and taken at two terms in the year, Whitsunday and
 “ Martinmas, by equal portions, forth of all and haill
 “ [*Here insert the lands, and the parish and sheriffdom*
 “ *in which they lie; and add*], or forth of any part or
 “ portion of the same, first, best, and readiest of the mails,
 “ farms, kains, casualties, profits, and duties thereof: redeemable always and under reversion in manner after mentioned.”

(*b*) If resignation be made by virtue of two or more procuratories, here you must add, “and sicklike compear-
 “ ed personally the said *P*, as procurator for *Q*, to that
 “ effect

the hands of the said Lords Barons of Exchequer, his Highness's commissioners, in his Majesty's name, as in the hands of our said Sovereign Lord, immediate lawful superior thereof; in favour, and for new infeftments of the samen, to be made, given, and granted back again to J (a), his heirs or assignees whatsoever, heritably and irredeemably (b), in such due and competent form as effeirs; and that conform to the patent letters of pro-

"effect specially constitute by the said Q., according to the letters of procuratory contained in a disposition, &c." If a subject be superior, say, "in the hands of the said —, immediate lawful superior of the lands and others above written; or the said — commissioner specially constitute by the above —, superior foresaid."

(a) And if it be lands wadset, say, "J, his heirs and assignees, heritably, redeemable, &c." [*Here take in the clause of reversion, as in the contract of wadset; then add*], "in such due and competent form as effeirs." And if it be upon an heritable bond, the clause will be the same, only with this difference, that the clause of reversion, as in the heritable bond, must be narrated.

(b) And if there be a tailzie or provisions in the dispositions or procuratory, the person in whose favour the same are granted, and all the substitutes and heirs of tailzie, must be here inserted as in the disposition and procuratory *verbatim*; and then add, "heritably and irredeemably, in such due and competent form as accords; but with and under the burden of the special provisions, conditions, restrictions, limitations, reversions, reservations, irritant and resolute clauses, after mentioned, and no other ways, viz." [*Here insert the restrictions, &c. and if it be a resignation of lands wadset, add*], "during the not redemption."]

N

curatory

curatory of resignation (*a*) contained in the letters of alienation and disposition of the lands and others above written, made and granted by the said *B*, heritable proprietor of the same, to and in favour of the said *J* and his forebears, heritably and irredeemably, of the date —: which resignation so made, the said *L*, (*b*) Esquire, Lord Chief Baron forebears, for himself, and in name and behalf of the remanent Lords Barons of the said court of exchequer, his Majesty's commissioners forebears, in his Highness's name admitted and accepted, by receiving of the said staff and baston, from the said *P*, procurator forebears, resigner thereof; and then, and immediately thereafter, gave and delivered back again all and haill [*Here repeat the lands; and then say*], lying in manner forebears, to the said *P*, who also compeared as procurator and attorney for, and in name and behalf of the said *J*, whose power of procuratory was clearly known and

(*a*) And if it be on a contract of wadset, add, "contained in a contract of wadset and impignoration of the lands and others above written, passed and perfected betwixt the said *B*, heritable proprietor thereof, and the said *J*, redeemable, and under reversion, in manner forebears, of the date the — day of — — years." And if it be on an heritable bond, add, "to the said *J*, his heirs or assignees whatsoever, redeemable always, &c." and observe the direction as above, in the case of a clause of reversion in a wadset.

(*b*) And if it be a subject-superior, say, "superior forebears, admitted and accepted by receiving, &c." [*Here insert the procurator's name, &c.*]

understood

understood by me Notary-public subscribing, to be bruiked, possessed, and enjoyed by the said *J* and his foresaids, (*a*) heritably and irredeemably, in all time coming, conform to the charter to be made and granted (*b*) by his Majesty to the said *J*, and his foresaids, thereupon, under his Highness's seal appointed by the treaty of union to be kept and used in Scotland in place of the great seal formerly made use of there, in such due and competent form as accords. Whereupon, and upon all and sundry the premisses, the said *P*, procurator and attorney for, and in name and behalf of the said *J*, asked and took instruments, ane or mae, in the hands of me Notary-public subscribing. These things were done within the said exchequer-house, betwixt the hours of eleven and twelve forenoon, day, month, year of God and of the king's reign

(*a*) Or if it be on a wadset, "redeemable always the lands and others foresaid, in manner particularly above mentioned."

(*b*) If it be a subject-superior, add, "by the said —, superior foresaid, to him, thereanent, in all points." And sometimes the charter is instantly signed. In that case say, "conform to the charter instantly presented, signed and granted by the said —, superior, &c." It is to be observed, that in resignations *in favorem*, as well as *ad remanentiam*, when a subject is superior, you are to notice the difference as remarked in the above instrument, and insert your procurator's name in place of the macer's, with the superior's or his commissioner's in place of the barons of exchequer; and in place of the exchequer-house, insert the particular house, and room of the house, where the instrument was taken; and then proceed as above.

respectively above mentioned, before and in presence of — and —, witnesses to the premisses specially called and required.

Instrument of resignation ad remanentiam in his Majesty's hands, with several variations.

IN the name of God, *Amen*, &c. In presence, &c. compeared personally *P*, one of the ordinary macers before the said court of exchequer, as procurator for *A*, to the effect under written, specially and lawfully constitute, by his letters of procuratory *ad remanentiam*, (*a*) made and granted by the said *A*, heritable proprietor and vassal therein, to and in favour of our Sovereign Lord the King's Majesty, and his heirs and successors, of the date the — day of —; and there, with such due reverence and humility as became, the said *P*, procurator foresaid (*genibus flexis*) purely and simply, by staff and baston, as use is, resigned, renounced, sur-

(*a*) If the lands be resigned to a subject-superior, say, "contained in the letters of alienation and disposition of the lands and others under written, made and granted by the said *A*, heritable proprietor and vassal therein, to and in favour of *B*, superior thereof, and his heirs and successors, of the date —." If it be of lands wadset, say, "contained in the letters of discharge and renunciation, and grant of redemption of the lands and others under written." And if it be of an yearly annualrent, add, "of the yearly annualrent after mentioned, upliftable forth of the lands and others after specified."

rendered,

rendered, *simpliciter* upgave and overgave, from the said *A*, his heirs and successors, and all others his representatives and assignees, all and haill (a) [*Here insert the lands, with the parish and sheriffdom in which they lie ; and then say*], together with all right, title, interest, claim of right, property, and possession petitor or possessor, whatsoever, which he, his predecessors and authors, heirs, successors, and assignees, had, have, or any ways may claim or pretend thereto, or to any part thereof, or to the mails and duties of the same, in all time coming ; in the hands of the (b) said Lords Barons of his Majesty's said court of exchequer, his Highness's commissioners, in his Highness's name, as in the hands of our

(a) If it be of an annualrent, add, " an yearly annualrent of —, or such an annualrent as for the time did correspond to the principal sum of —, borrowed and received by the said *A* from the said *B*, conform to his heritable bond, granted by him thereupon, dated —, and his seisin thereupon, duly registrate conform to act of parliament, of the date — ; and which yearly annualrent was by the said heritable bond appointed yearly to be uplifted and taken at two terms in the year, Whitsunday and Martinmas, by equal portions, forth of all and haill [*Here the lands must be enumerated as in the heritable bond.*]"

(b) If a subject be superior, say, " said *B*, immediate lawful superior thereof, in favour of him, his heirs and successors, *ad perpetuam remanentiam* ; to the effect the right and property thereof, then standing and remaining in the person of the said *A* and his forefairs, may return to the said *B* and his forefairs, and be conjoined, &c."

said Sovereign Lord the King's Majesty, immediate lawful superior thereof, in favour of his Majesty and his royal successors, *ad perpetuam remanentiam*; to the effect the right of property thereof, then standing and remaining in the person of the said *A* and his forefairs, may return to his Majesty and his forefairs, and be conjoined, consolidate, annexed, and incorporated with the right of superiority of the same, standing and established in his Highness's person, in all time coming, and may be peaceably bruiked, enjoyed, and possessed by his Majesty and his forefairs, and the rents, mails and duties thereof, paid to, uplifted, used, and disposed of by them, in all time coming; and that (*a*) conform to the said procuratory of resignation (*b*), in all points. Which resignation so made, the said L, Esquire, Lord Chief Baron, &c. admitted and accepted,

(*a*) And if it be of an annualrent, add, "all and hail the lands and others above specified, out of which the foresaid annualrent was appointed to be uplifted, may remain and abide with the said — and his forefairs, to be peaceably bruiked, enjoyed, and possessed, by him and them, as free of the burden of the said yearly annualrent, as if the said heritable bond had never been made or granted, nor seisin taken nor registrate thereupon, conform to the said letters of discharge, renunciation, and grant of redemption, containing the foresaid procuratory of resignation *ad perpetuam remanentiam*, shown, read, and produced, in presence, &c."

(*b*) If a resignation be made to a subject-superior, you may add, "and disposition above written, shown, read, and produced, in presence of me Notar-public and witnesses
" subscribing,

accepted, by receiving the foresaid staff and baston in his hands, from the said P, procurator foresaid, resigner thereof, to the end and effect particularly above mentioned. Whereupon, and upon all and fundry the premisses, the said Lord Chief Baron, for himself, and in name of the remanent Lords Barons of the said court of exchequer, his Majesty's commissioners above mentioned, in his Highness's name, asked and took instruments, &c.

T I T L E VI.

Of the attaining possession by tradition or delivery, and of the severall symbols requisite therein.

BEfore I proceed, it is necessary in this place to take notice in what manner possession is attained, and of the symbols necessary for that end; seeing it is a very essential point for a Notary, to know and understand all the different symbols used by our law and custom.

The property of any subject is never transferred from the annailzier, until such time as the purchaser attain possession thereof by tradition; which is defined to be, *the delivery of possession by the true owner to the receiver, with a design to transfer the property to him.*

“subscribing, in all points.” Or if it be of a wadset, add,
 “and discharge, renunciation, and grant of redemption
 “above written, shown, read, &c.”

Tradition

Tradition is twofold, *viz.* real, and symbolical. Real tradition is, when the thing itself (such as corn, wine, oil, an ox, or a sheep) is delivered.

Symbolical tradition is, when the thing to be possessed is not delivered, but only some, what as a sign or symbol thereof.

The word *symbolum*, or *symbol*, had many different significations amongst the ancients. For it signified a sign or badge to know one; a private note or watch-word; as also it signified what every one paid at his club of a feast or entertainment, as may be seen in Terence's two first plays, and also in that intitled *Phormio*.

But in this place it signifies, *the token or mark by law ordained to be used when the thing itself cannot be truly delivered.*

At what time this symbolical delivery was first introduced amongst mankind, is uncertain: but from several texts of holy writ, it seems to have been very ancient; and particularly, from the fourth chapter of Ruth, we may observe, that one kinsman's property amongst the Jews was transmitted to another, by the seller's plucking off his shoe, and giving it to the buyer; for, in ver. 7. of the said chapter, we are told, that *this was a testimony in Israel.*

As also, from the early ages of the Christian church we learn, that symbolical delivery, in investing the bishops in their temporalities, by kings and princes, was practised by the symbols of a crozier, denoting thereby the

the staff of command ; and by the prince's placing a ring on the finger of the bishop, giving him to understand, that as the marriage of laymen, denoted by a ring, is indissolvable, a bishop in the same manner ought to remain inseparably united to his church. The emperors of Germany, of old, had the sole power of investing the popes, they being vassals to these emperors for many years ; but in process of time these investitures created a great deal of trouble and confusion both in Italy and the empire, until that the Emperor Henry V. and Pope Calistus II. made an agreement thereanent in the year 1122.

Isidorus relates, that when the ancients promised any thing, they held in their hand a reed : which having broke, they again joined it, indicating thereby an acknowledgment of the agreement.

The Romans not only used a certain form of words in all their solemn contracts, but likewise they had certain stated symbols, whereby their intention and meaning might be more easily understood. Thus, in adoptions or emancipations, they used a symbolical sale of their children ; and in marriages they made use of fire and water, signifying, in a philosophical sense, by that symbol, the mutual love and union of the parties : and the faith and trust reposed in the wife's œconomy and management, was signified by delivery to her of the keys, at her arrival in her husband's house ; as the taking away the keys was a symbol of divorce.

And

And in the manumitting, or giving freedom to their slaves, they touched the person's cheek or ear, as a symbol of their freedom. And the reason of touching the ear, rather than any other part of the body, was, as Pliny relates, *Because, says he, the memory lies there.* In the interrupting of prescriptions, they used to break a twig of a tree; and in the institution of an heir, the testator gave a ring.

And moreover, we may observe the several symbols used in the coronation of Kings and princes, and in the creating of nobility and knights; not to mention that memorable symbol used by Charlemagne, in joining the armorial of Scotland, *viz.* the *lion*, with the *flower-de-luce*, not only to preserve to posterity the remembrance of the league by him entered into with Achaius King of Scotland, but also to perpetuate the friendship he had for the Scottish nation in particular. And from our historians we learn, that about the beginning of the eighth century the Florentines, in regard that a *lion* was the armorial bearing of Scotland, made a law, ordaining so many lions to be maintained at the public charge, as a symbol or testimony of their gratitude and esteem for that nation; because, by the singular courage and conduct of William, brother to the above-mentioned King Achaius, they had regained their former liberty.

Symbolical tradition, by the giving of earth of the lands, seems to have been used in the eighth century, as may be learned from the following

following remarkable story. When the Normans (whether Sigefredus or Rollo was their commander, is uncertain) arrived at the coast of Neustria, that they might have the pretence of some injury done them, to wage war against the inhabitants, they sent a young stripling ashore, adorned with a golden chain; not questioning but those who first encountered him would seize upon it, which they earnestly wished. The stripling being asked by the inhabitants, If he would sell or barter the chain? answered, He would. They having again asked him, What price he would have? he told them, He would take what price they pleased. The inhabitants, smiling at his simplicity, took the chain from him, and, as the price thereof, gave him a handful of dust from the ground. But that joke cost them dear: for the stripling returning to his countrymen, and having told them what had happened, they immediately landed their forces, and took possession of the country. The inhabitants asking by what law they did that, they answered, By the best and justest of all laws: a young stripling of theirs had been publicly infest in these lands, by the delivery of earth, as the accustomed symbol; and that not without paying for them: therefore they took possession of their own lands, acquired by law, and not by war.

These symbols are various, according to the constitution and laws of every nation, or as the laws are altered in themselves. It has been already

dy

dy told, in the title of feifins, That in Scotland, the way of giving poffeffion before the reign of King James I. was very uncertain; and in the borough-laws, *cap.* 56. we are informed, That when any man fells his tenements or lands, *he who fells fhall ftand within the houfe, and come forth of it; and the other who buys fhall ftand without it, and fhall enter in it; and the one fhall give to the provoft an penny for his paffing forth, and the other fhall give an penny for his entry and feifin. And if they exchange lands (be permutation) betwixt them, ilk one of them fhall give twoa pennies.*

The fymbols at this time generally in practice with us, may be reckoned, *1mo*, Such as bear fome refemblance to the fubject to be poffeffed, and, being part thereof, have fome affinity to natural poffeffion; or, *2do*, Such as are merely fuppoſitious, and introduced by cuſtom, to represent the delivery or inveſtiture.

To the firſt of theſe belongs infeſtments in lands, by the delivery of earth and ſtone thereof upon the ground of the ſamen; and it is abſolutely neceſſary, when a Notary gives infeſtment, that he and all the parties neceſſarily preſent thereat, be actually upon the ground of the lands: for Craig relates, that a feifin was found null and falſe, although it bore, *Theſe things were done upon the ground of the lands*; becauſe the parties were not upon the fixed ground thereof, but had put part of the

the ground of the lands within their shoes. Nevertheless this, by law or custom, may be otherwise altered in cases of necessity; as, infestments of lands lying in *Nova Scotia*, were appointed to be taken at the castle-gate of Edinburgh.

Infestments of annualrent, if it is paid in money, the symbol thereof is earth and stone of the ground, and a penny money; but if the annualrent is paid in victual, the symbol used to signify the delivery of possession, is a parcel of victual, and earth and stone.

Infestments in corn-mills are given by delivery of the clap and happer as the symbols; and in waulk-mills, by the trams thereof. But if these mills should want the clap and happer, or the trams, the notary must cause make somewhat as a representation thereof, which he must use in place of them.

Infestments of parsonage and vicarage teinds are; for the first, a handful of corn, stubble, straw, and grass; and for the latter, a fleece of wool, or a little wool.

Infestments in patronages of churches or chaplainries are, by delivery of a bible or psalm-book.

Symbols used in infestments of salmon, or white fishings, are, the delivery of the tow, net, and boat.

The symbol used in the infesting of an heir in a tenement within a royal burgh holding burgage, is by hasp and staple of the door of the
O tenement,

tenement, and earth and stone of the ground thereof.

Under the last head, may be comprehended the delivery of a scroll or cap, as the symbol of a civil, and the delivery of a batton for any military offices ; the delivery of a book and key to the professor of a college in the common-hall thereof ; and in the institution of ministers, the delivery of a bible within the parish-church : but as to the manse and glebe, the symbol was the same as in other infeftments of lands, *viz.* by earth and stone ; but this infeftment is now in disuse.

And lastly are comprehended under this head, the symbols used in resignations of both kinds, *viz.* by staff and baston ; and these symbols in resignations, by a special act of sederunt, dated 11th February 1708, are in-joined with certification, That if resignation be made hereafter in the superior's hands, by any other symbol than staff and baston, that the Lords will not sustain such resignations, or seifins following thereupon ; but that the same shall be void and null.

This act of sederunt was made upon a competition betwixt Calderwood of Pitteadie and Sir Thomas Young of Rosebank, whose infeftment in a tenement in Edinburgh the Lords sustained, albeit it carried resignation to have been made in the magistrates hands by the symbols of earth and stone, and the procuratory bore warrant to resign by staff and baston. The reason of the decision, as
given

given by Forbes, was, That, upon searching the town-records, earth and stone appeared to have been the ordinary practice.

I come next to set down such instruments as are usually requisite for the extinction of heritable redeemable rights ; but before I enter upon that subject, I thought it not improper to premise somewhat anent reversions, and give the Notary a small view thereof as contained in our several law-books, whereby he may the more easily conceive the import and meaning of these instruments. Of all which in the next title.

T I T L E VII.

Of reversions, and of the instruments necessary for the extinction of heritable redeemable rights.

THE word *reversion* comes from the Latin word *revertō*, a reverting, or returning back again ; and may be described to be, *A real evident, by which one person obligeth himself to another, that notwithstanding he is heritably infest in certain lands, yet how soon the annuallier, his heirs or assignees, shall make payment to him of a certain sum of money, or consign the same in a responsal person's hand, to be forthcoming to his use upon the premonition of a competent time, that he shall hold the lands lawfully redeemed from him, and shall renounce and redispone the same in*

competent form in favour of the annailzier, and redeliver to him the whole rights and securities made to him thereanent.

Reversions are twofold ; legal, and conventional.

Legal reversions are such as descend not from the agreement of parties, but from special law or statute ; as, the redemption of lands adjudged within ten years after the date of the adjudication, by *act 62. parl. 1. Cha. II.*

Conventional reversions are such as proceed from the special agreement and consent of parties, and the nature of the contract itself. And it is to be remarked, that all reversions are *stricti juris* ; i. e. they must be judged of literally, and so, as that the person who has the right to redeem (who, by our law, is called the *reversor*) may not claim or get more than what is precisely expressed in the contract ; which is in law, and by the judge, to be interpreted strictly ; for the words thereof are not to be expounded by a benign interpretation in favour of either party, but are to be taken in their natural and ordinary signification. Besides, the tenor of the reversion is not to be extended to persons or cases not expressed : and likewise all and every one of the provisions and conditions, &c. set forth therein must be literally observed, otherwise the order of redemption will be void.

Of old, reversions were only personal obligations, binding the person to whom the lands were

were wadset ; and the clause of reversion was usually ingrossed in the charter : for *Skene, de verb. signif.* in explaining this word, says, That in old times the clause of reversion was inserted in the charter, as was manifest by divers charters given by K. David II. in the registers, which contain the tenor of reversion after the clause *Tenendas et habendas*, (and gives the form of such a charter, dated *in anno 1419*) ; but that in his time the charter was given by the seller of the lands, and the reversion by the buyer thereof, severally, sealed and subscribed ; and the buyer kept the charter, and the annailzier kept the reversion. Which form appears to have had its beginning in the days of K. Ja. III. for in *act 28. parl. 5.* of that prince, the buying and selling of lands by charter and seisin, and the taking again of reversions, is called a new invention : and by the said act it is statute, that reversions shall be of force, not only against the first wadsetter himself, but also against all his successors in the wadset-lands ; wherefore reversions at this time are accounted as heritable and real rights, effectual against singular successors.

Reversions being either legal or conventional, as has been told above, the destitution or redemption of them is either by a voluntary renunciation of the wadset-right, and infeftment following thereupon, or by law, when process of declarator is raised for that effect. And if the reverfor shall discharge the reversion, the infeftment thereby becomes irre-

deemable, and ceaseth to be a wadset. And this discharge of the reversion must be registrate, as the *act* 16. *parl.* 22. Ja. VI. directs, otherwise it will not be effectual against singular successors : or if the wadsetter shall voluntarily renounce the wadset-right, that renunciation, or grant of redemption, must also be registrate, in terms of the above-cited act, otherwise it will have no effect against a singular successor in the wadset.

Declarators of redemption must be diversely gone about in legal reversions, and in conventional.

The order of redemption of adjudications by virtue of the legal reversion, is valid by premonition and consignation, and instruments taken thereupon ; wherein there is not appointed a determined time upon which the premonition must be made, or a determined place where the consignation must be made, nor the person of the consignatary : but the premonition may be upon any number of days sufficient for the consignation, even though it were the same day of the premonition, as Craig observes. But, if the creditor be personally apprehended, the consignation must be in the way most to his advantage, either near the place of premonition, or the lands adjudged, or the parish-kirk where they lie, or his dwelling-house ; all which are accounted competent places, where consignation may be made. But if the creditor be out of the country, or have no certain abode,

bode, letters of premonition will be obtained from the Lords of Session, *periculo petentis*, for premonition to be made, upon sixty days, at the market-cross of Edinburgh, pier and shore of Leith, and for consignation to be made in Edinburgh. For by a decision, 22d February 1631, Murray *contra* Lord Yester, observed by Durie, the order was sustained for redemption of an apprising near expiring, although the consignation was only at Edinburgh, and not at the parish-kirk where the lands lay, or at the debtor's dwelling-house, he being out of the country, and Edinburgh being reputed the *communis patria* of all Scotmen. And by another decision, 23d July 1622, Earl Desmont against Hay, also observed by Durie, the Lords found, That where the party was in the country, the order by summons of premonition, and citation personally taken thereupon, is void and null; in regard that in orders of redemptions of this nature, the requisition ought to be made by a procurator, having power from the party to require, and that instruments should be taken thereupon in the hands of a Notary, and before witnesses, as in all other redemptions.

The order of redemption upon conventional reversions, is by premonition and consignation, or requisition and attendance.

Premonition is an act or deed, whereby the reverfor, or his procurator authorised by a legal mandate or procuratory in writ, premonisheth

nisheth the wadsetter, his heirs and successors, either universal or singular, in possession, conform to the tenor of the reversion, to appear at the place of consignation, and receive satisfaction according to the reversion. Requisition is, when the wadsetter, or other creditor, rather desire to have their money, than to retain the wadset-right, or right of annual-rent : in that case they are to require their money forty days before any term, or such a number of days as are contained in the clause of requisition contained in these rights, and this is called an *instrument of requisition* : and if the debtor fail to compear at the day and place contained in the instrument of requisition, or, compearing, does not pay the money ; then the creditor takes another instrument upon this order, called an *instrument of attendance*, and protests for the penalty and damages. And in either case, whether it be a premonition or requisition, it must necessarily be done by way of instrument, and no other ways ; as has been observed above, in the case of Desmont against Hay.

Premonition may be upon any number of days, as parties agree, and as contained in the reversion, whether it be in a paper apart, or *in gremio juris* ; but generally, in conventional rights, it is stipulate to be upon forty days ; and these days are so to be reckoned, that they be all free, without counting the day on which the premonition was made.

Premonition may be done either personally,
or

or at the wadsetter's dwelling-house ; and the particular dwelling-house must be designed in the instrument, otherwise the premonition will be null ; as was decided the 13th December 1626, Earl of Buccleugh *contra* Young, observed by Durie. If the wadsetter be minor, premonition must be used against the tutors and curators, either generally, at the market-cross, or personally, by letters of supplement from the Lords of Session, and not by an instrument taken at the market-cross ; as was found the 15th June 1680, Gordon *contra* Earl of Queensberry, observed by Stair.

When one is to premonish a wadsetter, either personally or at his dwelling-house, there must necessarily be present with the party having right to the reversion, or his procurator authorised by him, a Notary-public, and a sufficient number of unexceptionable witnesses ; and there the party himself, or his procurator, exhibits the letter of reversion apart, or the writ bearing the same, which must be read over before the witnesses present ; and then the procurator must deliver to the Notary his procuratory from the reverfor, if the premonition be made by a procurator, which must also be read over : which done, the party, or his procurator, does premonish the wadsetter to compear, the time and place mentioned in the reversion, and there to receive payment and satisfaction in the terms thereof ; all which must be carefully put in writing, and extended by the Notary in the form of a
public

public instrument ; for if any of these be omitted, the premonition will be null.

Consignation must also be done by way of instrument, bearing the tenor of the premonition, and the production and reading thereof, together with the reading of the reversion and procuratory, the same way as is before said of the premonition, and the coming to the place upon the day prefixed in the reversion and instrument of premonition, which may be any time of the day : and therefore the wadsetter must attend that day from mid-day to sun-set, and upon the wadsetter's refusing to renounce, or not appearing, the particulars contained in the reversion, immediately after sun-set, are to be consigned, according thereto, upon public intimation, by calling the wadsetter at the most patent door ; which must be done *in forma specifica*, and not *per equipollens*. See *Stair's instit. lib. 2. tit. 10. § 18.*

The order of redemption being thus lawfully used, the action thereupon is a declarator of redemption ; because it is the order that constitutes the redemption, and the declarator but finds and declares it to be orderly proceeded, and decerns the wadsetter to denude himself conform thereto : and therefore, though the reversion be personal, excluding assignees, if that person once use the order, he may assign it and dispoise the lands as redeemed ; and the assigny, even at any time, will have interest to declare ; as was decided 29th July

July 1623, Earl Marischal *contra* Keith, and 3d March 1630, Murray *contra* Myles ; as also see the 6th February 1630, Muir *contra* Muir, all observed by Durie.

The effect of declarator of redemption is, That it makes the redeemed lands belong to the redeemer, and make the sums consigned moveable, and to belong to the wadsetter's executors, if he hath accepted the consignment, or if declarator doth follow in his lifetime ; but if declarator do follow after the wadsetter's death, the consigned sums will not belong to his executor, but to his heir, who remains proprietor of the wadset : but if declarator passes in the wadsetter's life, it takes away the real right of wadset ; so the money comes to be in the property of the wadsetter as moveable, and falls to his executors ; which, until declarator, is not so, seeing the order may be passed from. Thus far concerning reversions. Let us now proceed to the instruments themselves, the several procuratories requisite and usual being fully treated of in the next title.

Instrument of premonition.

AT, &c. (a). In presence of me Notary-public, and witnesses subscribing, appeared personally *A*, as procurator specially constitute for and in name and behalf of *B*,

(a) Some Notaries are accustomed to begin these instruments with the invocation, in the same manner as seissins.

conform

conform to the letters of procuratory granted to him thereanent, of the date —, and passed with me the said Notary-public and witnesses after specified, to (a) the personal presence of C, heritor (b) of the lands and others after

(a) But if the party cannot be found personally, then he must be cited at the place of his abode. Which place must be particularly pointed out in this manner: “ M, the mansion-house of —, lying in the sheriffdom of —, and parish of —, at which place the said C and his family presently reside.”

(b) If the premonition be to an annualrenter to receive the sum, upon payment of which the right is redeemable, then say, “ annualrenter and heritor of the yearly annual-rent after mentioned, upliftable yearly forth of the lands and others underwritten, lying in manner after specified, having and holding in his hands [*ordinarily in these kinds of rights there is no separate letter of reversion, but the extract of the seisin to follow upon the heritable bond, in which the reversion is ingrossed, by a special clause in the bond is declared sufficient for using the order of redemption; and in this case the seisin must be extracted, and narrated as follows*], an extract of a seisin, under the hand of —, clerk to, and keeper of the particular register of seisins, kept at —, for the shire of —, (which, by the heritable bond underwritten, is declared sufficient for using the order of redemption of the annualrent after specified), following upon an heritable bond, granted by the said B to the said C, under the sign and subscription of —, N. P. of the date the — day of — years, duly registrate in the said particular register of seisins, &c. upon the — day of — thereafter. By the which heritable bond the said B having bound and obliged him, &c. [*Here narrate the bond, and then add*], as the said heritable bond, and seisin following thereupon, more fully propoort.” But if

after mentioned, having and holding in his hands an contract of wadset (a), made and passed betwixt the said B and C on the one and other parts, dated —, whereby (for the causes therein specified) the said B sold, annailzied, impignorated, and disposed, &c. [*Here narrate the contract of wadset and clause of reversion therein contained, in the same manner as in the procuratory; and then add*], as the said contract of wadset more fully bears: and sick-like, having and holding in his hands, the foresaid letters of procuratory, made and granted by the said B to the said A, authorising and empowering him to make the premonition after specified, and follow forth the haill order of redemption in manner under written. Which (b) contract of wadset, containing the clause of reversion above mentioned, together with the procuratory above ex-

it be to premonish an adjudger, say, “adjudger of the
“lands and others after mentioned, having and holding in
“his hands an extract of a decreet of adjudication, obtained at the instance of the said C, against the said B, before the Lords of Council and Session, of the date —;
“whereby the said Lords adjudged, decerned, and declared the ground-right and property of all and haill, &c.” Here narrate the decreet of adjudication, with the charter and infestment following thereupon.

(a) If the letter of reversion be on a paper apart, it must be here deduced and narrated.

(b) Or, “extract of the seisin above mentioned, bearing the reversion above specified, together with the procuratory above expressed, the said A, &c.” Or, “decreet of adjudication, together with the procuratory, &c.”

pressed, the said *A*, procurator foresaid, gave and delivered to me Notary-public, to be read and published in presence of the witnesses under written ; and which accordingly I did. After the production, exhibition, and public reading of which contract of wadset and procuratory above mentioned, the said *A*, as procurator foresaid, in name and behalf of the said *B*, made due and lawful intimation and premonition to the said *C*, to compear (*a*), upon Whitsunday eve next to come, betwixt sun-rising and down-passing thereof, within the new session-house of Edinburgh, at that place where the commissaries use to sit in judgment ; and then and there to receive from

(*b*) Or if it be for redemption of lands adjudged, say,
 “ within the said *C* his dwelling-house of —, in the shire
 “ of —, [*or*, the parish-kirk of —, within which the
 “ lands and others adjudged do lie] upon the — day
 “ of — years next to come, betwixt sun-rising and
 “ down-lapsing thereof ; and then and there to accept and
 “ receive from the said *B*, or his procurators in his name,
 “ the foresaid sum of — money foresaid, with the ex-
 “ penses of the infestments, and composition to the supe-
 “ riors ; an account whereof the said *A*, procurator fore-
 “ said, did require from the said *C*, to the end the samen,
 “ in case of absence or refusal, may be consigned in manner
 “ after mentioned ; and that for the lawful redemption,
 “ loosing, and outquitting from the said *C*, of all and hail
 “ the lands and others above adjudged, lying as said is.
 “ And sicklike the said *A*, procurator foresaid, required
 “ the said *C* to bring along with him, the time and place
 “ foresaid, the decret of adjudication above mentioned,
 “ with the abbreviate thereof, grounds of the samen, and
 “ infestments following thereupon, with a sufficient renun-
 “ ciation, &c.”

the

the said *B*, or his procurators in his name, the foresaid sum of — ; and that for the redemption of the said lands and others contained in the said contract. And sicklike the said *A*, procurator foresaid, required the said *C* to bring along with him, the time and place foresaid, the (*a*) contract of wadset above written, and infestment following thereupon, with an sufficient renunciation and grant of redemption of the same, in favour of the said *B*, and his heirs and successors; all to be delivered up to the said *B*, or his procurators in his name, the time and place foresaid: with certification to him, if he failzie to compear, or, compearing, should refuse to grant the foresaid renunciation, and deliver up the same, with the writs above specified; then, and in either of these cases, the said *B*, or his procurator in his name, would consign the sums of money above mentioned, in the terms (*b*), and after the form and tenor of the reversion above written in all points: Whereupon, and all and fundry the premisses, &c. (*c*).

Instrument

(*a*) Or, "heritable bond above written."

(*b*) If of lands adjudged, add, "conform to the tenor of the acts of parliament, made anent legal reversions, in all points."

(*c*) When premonition is made to the wadsetter, annualrenter, or adjudger, at their dwelling-houses, the instrument must bear this order immediately after the close thereof, and before the Notary subjoin his docket, and the

Instrument of premonition for redemption of lands wadset, at the instance of tutors, and containing letters of supplement against tutors and curators, &c.

AT, &c. In presence of me Notary-public subscribing, and witnesses after mentioned, compeared personally T, messenger, procurator lawfully constitute by A and B, tutors-testamentary to K, for their interest, to the effect under written, by their letters of procuratory of the date —; and likewise as messenger and sheriff in that part specially constitute by his Highness's letters of supplement passed under the signet, to the effect under written, of the date —: and the said T, having in his hands the foresaid letters of procuratory, and letters of supplement under the signet, together with the contract of wadset, containing therein the reversion after spe-

witnesses subscribe, as follows: " And in regard the said
 " C could not be personally apprehended, therefore I the
 " said Notary-public subscribing, for his better certioration
 " of the premisses, affixed and left at and upon the most
 " patent door or gate of his dwelling-house of — an full,
 " authentic, and exact copy of this present instrument, sub-
 " scribed by me, bearing the witnesses above written their
 " names and designations therein inserted, and hereto sub-
 " scribing." It is likewise to be observed, that as all these
 kinds of instruments, and generally all instruments, necessary in the redemption of heritable redeemable rights, are writs of importance, therefore the Notary ought to subjoin thereto his long docket.

cified,

cified, passed to the personal presence of *C*, one of the two heirs-portioners served and returned to the deceased *D*; and also to the personal presence of *E*, daughter and heir to the deceased *F* her mother, the other sister and heir-portioner of the said deceased *D*, procreate betwixt her and *G* her husband; and also to the personal presence of the said *G* for himself, and as tutor and administrator of law to the said *E* his daughter; and in like manner to the personal presence of *H* and *J*, tutors and curators to the said *C*, for their interests: and after reading and publishing the writs above narrated, in presence of the several persons above named, made to them severally the intimation and premonition under written. Likeas, the day foresaid, the said *T*, at command of the foresaid letters under the signet, and procuratory, passed to the market-cross of —, head burgh of the sheriffdom of —, within which the said *C* and *E*, and the said tutors and curators above specified, presently dwell; and there, after the crying of three several oyesses, open proclamation, and public reading of the foresaid letters and procuratory, in his Highness's name and authority, and also for and in name and behalf of the said *K* and her tutors for their interest, made due and lawful intimation and premonition to them, and to all others the tutors and curators of the said *C* and *E*, if they any have, for their interest, to compear within St Giles's kirk of Edlinburgh, at that place thereof where

the tomb of the deceased Earl of Moray is situate, the fifteenth day of May next to come, being Whitsunday-even, in this instant year —; and then and there, the foresaid day, betwixt the sun-rising and down-passing thereof, to receive from the said *K*, and her tutors and curators foresaid, or their procurator in their names, the sum of ten thousand pounds Scots money, and that for the lawful redemption, loosing, and outquitting from the said *C* and *E*, their heirs and assignees, and frae the said *G*, for himself, and for his own right and interest of all and haill the lands, &c. and others mentioned in the foresaid letters and procuratory, lying —, wadset by the deceased *M*, to the also deceased *D*, his heirs and assignees, in manner and under reversion as is rehearsed in the foresaid contract, letters of procuratory, and letters under the signet; and to which lands and others foresaid the said *K*, and her tutors for their interest, have right in manner specified in the samen letters under the signet, and procuratory foresaid; and also to hear and see the said *K*, and her tutors for their interest, or their procurator in their names, observe, keep, and fulfil, to the said *C* and *E*, and the said *G*, for himself, and as tutor and administrator of law to the said *E* his daughter, and likewise to the tutors and curators above named, and to all others the tutors and curators of the said *C* and *E*, if they any have, for their interest, the haill terms and conditions prestable by the said deceased *M* to the
said

said deceased *D*, as contained in the said contract of wadset in all points, upon the granting of an lawful renunciation and grant of redemption to and in favour of the said *K*, her heirs and assignees, of the samen lands and others above rehearsed; with certification, if they failzied, the said *K* or her procurator would consign the sum of money above mentioned in terms of the reversion above specified. This the said messenger and procurator did after the form and tenor of the said contract, letters of procuratory, and letters passed under the signet, in all points: Of the which letters passed under the signet, the said *T*, messenger, affixed and left an just and authentic copy at the foresaid market-cross: and upon all and fundry the premisses asked and took instruments, ane or mae, in the hands of me Notary-public subscribing. These things were done betwixt the hours of three and seven in the afternoon, day, month, year of God and King's reign respectively above written, before these witnesses, *viz.* to the premonition of the persons above named, personally apprehended, as said is, *L*, *O*, *P*, and *Q*; and to the foresaid premonition at the market-cross of —, *R*, *S*, *T*, and *W*, specially called and required to the premisses.

*Instrument of premonition against one presently
forth of the kingdom.*

AT, &c. The which day, in presence of me
Notary-public, and witnesses subscribing,
compeared

compeared personally *A*, messenger, and sheriff in that part, having and holding in his hands our Sovereign Lord's letters of premonition, dated and signet —, raised at the instance of *B*, against *C*; and passed, at command of the said letters, with me and the said witnesses, to the market-cross of Edinburgh, pier and shore of Leith, respectively and successively, and at each of these places, after the crying of three several oyesses, open proclamation, and public reading of the said letters, he, in his Majesty's name and authority, lawfully warned, premonished, and required the said *C*, because he is presently forth of the kingdom, upon sixty days warning, to compear within —, upon the — day of — next to come, in this instant year —; and there, betwixt sun-rising and down-going thereof that day, to receive from the said *B*, or his procurator in his name, (*a*) all and hail the sum of six thousand pounds Scots money; and that for redemption of all — and

(*a*) Or, "an ten-merk piece of gold; and that for the lawful redemption, loosing, and outquitting from the said *C*, of all and hail the houses, tenements, &c. disposed by the said *B* to the said *C* his son, his heirs and assignees, heritably, but under reversion conform to his disposition, dated —; and in which the said *C* is infeft, under reversion, as is testified by his seisin, dated —, duly registrate; and which houses, tenements, &c. lying as said is, were declared redeemable by the said *B* from the said *C* and his forefairs, by payment making to him or them of the said ten-merk piece of gold, at any time in his own lifetime allenary; and that upon granting an — sufficient

and haill the lands, &c. disponed, by the said *B*, in favour of the said *C*, heritably; but under reversion, conform to the contract of wadset passed betwixt them, of date —, and in which the said *C* was infeft by seisin following thereon, dated —, and registrate —; and to hear and see the said reversion obtemperate and fulfilled in all points, after the form and tenor thereof, upon the granting of a valid renunciation, and delivering the same, and the said contract of wadset and seisin, to the said *B*; and made certification to the said *C* as effects, and left and affixed an just and authentic copy of the said letters upon the said market-cross of Edinburgh, and another just and authentic copy of the samen upon the said pier and shore of Leith. Upon the which, and all and sundry the premisses, &c.

“ sufficient and lawful renunciation and grant of redemption, containing thereintil an procuratory of resignation, for resigning the said houses and tenements, &c. in the hands of the provost, or any of the bailies of the said burgh of —, to be made, subscribed, and delivered by the said *C*, in favour of the said *B* his father, his heirs and assignees whatsoever; and to hear and see the said houses, tenements, &c. lawfully redeemed, loosed, and outquitted, and the said reversion lawfully and duly satisfied, obtemperate, and fulfilled by the said *B* to him, conform thereto, in all points: with certification to him, if he failzie, the said ten-merk piece of gold shall be consigned in the hands of any responsal man, living within the said burgh of —, to be forthcoming to the use of the said *C* and his forefairs, for the redemption of the said houses, tenements, &c. Of the which letters the said *A* messenger affixed and left, &c.” as above.

Instrument

Instrument of consignation.

AT, &c. compeared personally *A*, as procurator for, and in name and behalf of *B*, specially constitute, conform to the letters of procuratory granted to him thereanent, of the date —, and passed with me Notary-public and witnesses after specified, to the new session-house of Edinburgh, to that part thereof where the commissaries use to sit in judgment; having and holding in his hands (*a*) an contract of wadset, made and passed betwixt *B* and *C* on the one and other parts, dated —; whereby (for the causes therein specified) the said *B* sold, annailzied, impigno-

(*a*) Or, “ an extract of a seisin under the hand of —
 “ Notary-public, of date —, following upon an heritable bond, dated —; by which the said *B* became
 “ bound to infest the said *C*, his heirs, &c. in an annual
 “ rent of —, payable forth of the lands of —,
 “ and others therein mentioned, and by which the said
 “ annual rent is declared redeemable, in manner therein
 “ specified, and that a copy of the bond, or extract of the
 “ seisin thereon, should be sufficient for using the order of
 “ redemption under written, as the said extract, signed by
 “ —, keeper of the records of seisions for the shire of
 “ —, in which the said seisin was registrate, bears.”
 Or, “ an extract of a decreet of adjudication obtained at
 “ the instance of the said *C*, against the said *B*, before the
 “ Lords of Council and Session of the date —; where-
 “ by the said Lords adjudged, decerned, and declared the
 “ ground-right and property of all and haill, &c.” [*Here
 narrate the decreet of adjudication, with the charter and
 infestment following thereupon.*]

rated,

rated, and disposed to the said *C*, his heirs and successors, &c. [*Here narrate the contract*], as the said contract of wadset more fully bears; and sicklike, having and holding in his hands the foresaid letters of procuratory, made and granted by the said *B* to the said *A*, authorising and empowering him to make the premonition, and perform the rest of the order after specified, in manner under written; and sicklike, having and holding in his hands the said instrument of premonition, under the sign and subscription of — Notary-public, of the date —, bearing, That the said *A*, as procurator for, and in name and behalf of the said *B*, duly and lawfully authorised for that effect, had made due and lawful intimation and premonition to the said *C*, to compear (*a*), at the date hereof, within the new session-house

(*a*) Or, “ within the parish-church of —, in the she-
 “ riffdom of —, within which the said lands and others
 “ above adjudged do lie, upon this day, being the — day
 “ of — — years, betwixt sun-rising and sun-setting;
 “ and then and there to receive and accept, from the said
 “ *B*, or his procurator in his name, the foresaid accumu-
 “ late sum of — money, and annualrents thereof, with
 “ the expenses of the infestment and composition to the su-
 “ perior; an account whereof the said *A*, procurator fore-
 “ said, did require from the said *C*, to the end the samen,
 “ in case of his absence or refusal, might be consigned in
 “ manner after mentioned; and that for the lawful redemp-
 “ tion, loosing, and outquitting from the said *C*, of all
 “ and haill the lands and others above adjudged, lying as
 “ said is: and also bearing, That the said *A*, procurator
 “ foresaid, had required the said *C* to bring along with him,
 “ the

house of Edinburgh, at that part thereof above mentioned; then and there to receive from the said *B*, or his procurator in his name, the foresaid sum of —, and other sums due by the clause of reversion above specified; and to hear and see the hail other conditions prestable by the reversor fully performed; as the said procuratory, and instrument of premonition following thereupon, more fully bear. And which contract (*a*), containing the clause of reversion above mentioned, procuratory for making the said permonition, and performing the rest of the order under written, in manner after mentioned, and instrument of premonition following thereupon, of the dates, tenors, and contents above expressed, the said *A*, procurator foresaid, gave and delivered to me the said Notary-public, to be

“ the time and place foresaid, the decret of adjudication
 “ above mentioned, with the abbreviate thereof and grounds
 “ of the same, and infestments following thereupon, with
 “ an sufficient renunciation and grant of redemption of the
 “ same in favour of the said *B*, his heirs and successors,
 “ all to be delivered up to the said *B*, the time and place
 “ foresaid: with certification, if he failzied to compear, or,
 “ compearing, should refuse to grant the foresaid renunciation,
 “ and deliver up the same with the writs above specified;
 “ then, and in either of these cases, the said *B*,
 “ or his procurator in his name, would consign the sums of
 “ money above written, in the terms of, and conform to
 “ the tenor of the acts of parliament made anent legal re-
 “ versions, in all points.”

(*a*) Or, “ extract of the seisin above specified.” Or,
 “ extract of the decret of adjudication.”

read

read and published in presence of the witnesses under written. All which accordingly I did. After producing, exhibiting, and public reading of the which writs, particularly above mentioned, in presence of the said witnesses and others present, the said *A*, as procurator for, and in name and behalf of the said *B* (*a*), did take out, number, and tell down, in current money, having passage and course of payment, (*b*) the said sums, upon payment or consignment whereof the lands and others above specified are redeemable, in manner particularly above mentioned; and required him, or any person in his name impowered by him, to accept thereof, and receive the samen, and to deliver

(*a*) If he who hath the redeemable right in his person does not compear, then you must add, "in regard the said *C* was absent, and failzied to compear this day and place, to the effect above mentioned, notwithstanding of the premonition above specified, did cause make public intimation to the said *C*, by calling him openly and publicly at the most patent door of —, after the crying of three several oyesses, as use is, and thereafter, &c."

(*b*) Or, if it be consigning of sums due by adjudication, say, "the foresaid accumulate sum of —, and annualrents thereof from the date of the decreet of adjudication to this day and date, with the sum of —," [*There ought to be consigned a sum exceeding the expenses of the infestment and composition to superiors*]; "to the effect that out of the first end thereof, the said *C* may have the sums truly expended for the expenses of infestment following upon the said decreet of adjudication, and composition to the superior, as the same shall be liquidated by the Lords of Council and Session, in the proces of declarator of redemption to follow hereupon; and required the said *C* to accept thereof, and receive the same, and to deliver up to him, &c."

up to him, as procurator for, and in name of the said *B*, the foresaid contract of wadset (*a*), and charters and infeftments following thereupon, with an sufficient renunciation and grant of redemption of the same, containing procuratory of resignation, and all clauses needful, to and in favour of the said *B*, his heirs or assignees, to be cancelled, destroyed, or kept, used, and disposed upon, by the said *B* and his foresaids, as their own proper writs and evidents, in all time coming. And the said *C* (*b*) having compeared, the time and place foresaid, did offer to accept and receive the foresaid sum, and to deliver up the writs particularly above expressed : (*c*) but having offered no renunciation and grant of redemption, at least no formal one, containing procuratory of resignation and other usual and necessary clauses ; therefore the said *A*, as

(*a*) Or, “ heritable bond, or, decret of adjudication, &c.”

(*b*) But, if neither the person nor any impowered by him appear, add, “ nor no person in his name, authorised and “ impowered by him, having compeared to receive the said “ sum, and deliver up the particular writs above mentioned, with an sufficient renunciation and grant of redemption of the same, containing procuratory of resignation, “ and all other clauses necessary ; therefore, &c.”

(*c*) Or, if it be consigning sums due by adjudication, say, “ But the account of expenses of the infeftment, and “ composition to the superior, being very extravagant, and “ not instructed ; besides that he offered no renunciation “ and grant of redemption, at least no formal one containing the usual and necessary clauses ; therefore, &c.”

procurator

procurator for, and in name and behalf of the said *B*, having waited and attended till sun-setting said day, at the place of redemption above written, did consign the foresaid sum of — money (*a*) in the hands of —, then and there present; who accordingly received the same, to be forthcoming for the use, and to the utility and behoof of the said *C*: and protested, That the lands and others above written (*b*) were, and might be holden and repute, loosed and outquitted, from the said *C* and his forefairs, by the said *B* his constituent, in the terms of, and conform to the tenor of the (*c*) reversion above specified in all points; and that the said *B* may have full regrefs, ingress, and access, in and to the lands and others above written; and the said *C* excluded and debarred therefrom in all time coming: and further protested, That the said *C* might be liable to his constituent in the expenses of an process of declarator of redemption to follow hereupon, and of all other cost, skaith, dama-

(*a*) And add here, “and annualrents thereof from the date of the decret of adjudication to this day and date, together with the sum of — money foresaid, to the end the said *C* might be paid of his expenses, as the same should be modified by the Lords of Session in the declarator after mentioned.”

(*b*) Or, if it is an infeftment of annualrent, say, “That the annualrent or yearly duty above written, and lands, &c. out of which the same is upliftable.”

(*c*) Or, if it be consigning sums due by adjudication, add, “laws and acts of parliament made anent legal reversions in all points.”

ges, and expenses the said *B* should sustain, suffer, and incur through and by the said *C* his not receiving of the sums of money above written, consigned through his default as said is, and not delivering up the (*a*) wadset-right and others above written, with an sufficient renunciation and grant of redemption of the same, containing all clauses needful, in the terms, and after the form and tenor of the (*b*) reversion, procuratory, and instrument of premonition above written, for making the consignment above specified, in all points. Whereupon, and all and sundry, &c.

Instrument of requisition.

AT, &c. in presence of me Notary-public and witnesses subscribing compeared personally *A*, as procurator for, and in name and behalf of *B*, specially constitute, authorised and impowered to the effect after mentioned, conform to the letters of procuratory granted to him thereanent of the date — ; and passed with me Notary-public and witnesses after specified, to the personal presence of *C* (*c*), reverfor of the lands [*or* yearly an-

(*a*) Or, “ heritable bond,” or, “ decreet of adjudication.”

(*b*) Or, “ acts of parliament anent legal reversions in all points.”

(*c*) Or, “ to —, the mansion-house of *C*, lying in the sheriffdom of — and parish of —, at which place the said *C* and his family presently reside,” if the reverfor was premonished at his dwelling-house.

nualrent]

nualrent] under written ; having and holding in his hands an contract of wadset, [*or heritable bond*], &c. [*Here narrate the dispositive clause in the wadset, or obligation to invest in the heritable bond, and clauses of reversion and requisition ; then add*], as the same bears. Which contract of wadset, [*or heritable bond*], together with the procuratory above expressed, empowering the said *A* to make the requisition after mentioned, and follow forth the rest of the order in manner under written, he gave and delivered to me the said Notary-public, to be read and published in presence of the witnesses under written. Which accordingly I did. And after the producing and public reading of the writs above mentioned, the said *A*, as procurator foresaid, in presence of me the said Notary-public and witnesses after specified, did duly and lawfully premonish and require the said *C* (*a*) to compear within, &c. [*Here name the place of redemption*], upon the term of — next to come, betwixt sun-rising and down-passing

(*a*) Requisition, as well as premonition must be made to the tutors and curators of the reversor, if he be minor, either by requiring them personally, or by letters of supplement at the market-cross of the head burgh of the shire where the minor resides : or, if the reversor hath no certain place of abode, or is forth of Scotland, he must be cited at the market-cross of Edinburgh, pier and shore of Leith, by letters of requisition under the signet. In both which cases the instrument of requisition may be framed from those of premonition in the like cases mentioned above, so that it was thought needless here to repeat them.

thereof; and then and there to pay and deliver to the said *B*, or his procurator in his name, the foresaid sum of — (a), under the penalty above mentioned; and, upon payment, to accept and receive from the said *B*, or his procurator in his name, an valid and sufficient renunciation and grant of redemption of the premisses, together with the said contract of wadset, charters and infeftments following thereupon, in favour of the said *B* and his foresaids, to be used and disposed upon by the said *C* as his own proper writs and evidents in all time coming; and that for the lawful redemption, loosing, and outquitting of the lands and others above mentioned, from him and his foresaids, *in perpetuum*. Whereupon, and all and sundry the premisses, &c.

Instrument of attendance.

AT, &c. compeared personally *A*, as procurator for, and in name and behalf of *B*, specially constituted, authorised, and impowered by him, to the effect after mentioned, conform to the letters of procuratory granted to him thereanent, of the date —; and passed with me the said Notary-public, and witnesses after specified, to the new session-house of Edinburgh, to that place thereof where the commissaries usually sit in judgment; having

(a) Or, if it be infeftment of annualrent, add, “and bygone annualrents thereof resting preceding the said term.”

and

and holding in his hands an contract of wadset [or heritable bond], &c. [*Here narrate the dispositive clause of the wadset, with the clauses of reversion and requisition ; and then add*], and sicklike, having and holding in his hands the foresaid letters of procuratory, made and granted by the said *B* to the said *A*, authorising and empowering him to make the requisition after mentioned, and perform the rest of the order in manner under written ; and further, having and holding in his hands an instrument of requisition, under the sign and subscription of — Notary-public, of the date —, bearing, That the said *A*, as procurator for, and in name and behalf of the said *B*, specially authorised for that effect by the procuratory above mentioned, did duly and lawfully premonish and require the said *C* to compear, at the place of redemption above specified, upon this day, being Whitsunday's even, this instant year of God one thousand seven hundred and forty, betwixt the sun-rising and down-passing thereof; and then and there to pay and deliver to the said *B*, or his procurator in his name, duly and lawfully authorised and empowered for that effect, the foresaid sum of —, under the penalty above written ; and, upon payment, to accept and receive up from the said *B*, or his procurator in his name, an valid and sufficient renunciation, discharge, and grant of redemption of the premisses, together with the said contract of wadset, charters and infestments following

following thereupon, in favour of the said B and his forefaids, to be used and disposed upon by the said C, as his own proper writs and evidents in all time coming; and that for the lawful redemption, loosing, and outquitting of the same from the said B and his forefaids, *in perpetuum*. And in case of his absence or refusal, protested, That he might be liable for the sum of —, of liquidate expenses, by and attour the principal sum above mentioned, and further for all cost, skaith, damage, and expenses he might happen to sustain or incur through the not payment of the said sum, in the terms of the clause of requisition above mentioned, in all points; as the said instrument more fully bears. Which contract of wadset, [*or heritable bond*], with the forefaid procuratory for making the said requisition, &c. and instrument of requisition following thereupon, above specified, of the dates, tenors, and contents above expressed, the said A, procurator forefaid, gave and delivered to me the said Notary-public, to be read and published in presence of the witnesses under written. All which accordingly I did. After producing, exhibiting, and public reading of which writs, particularly above mentioned, in presence of the said witnesses and others present, the said A, as procurator for, and in name and behalf of the said B, after having waited and attended at the place forefaid, this day, from sun-rising until after sun-setting, declared he was ready and willing to
receive

receive the fums of money above written, and give up and deliver the faid contract of wadset, [*or heritable bond*], with a fufficient renunciation, difcharge, and grant of redemption of the fame. All which he did exhibit, fhew, and produce, in prefence of me the faid Notary-public and witneffes: and in regard the faid C, nor no other perfon in his name, compeared, to the effect above mentioned, notwithstanding he the faid C was openly and publicly called at the moft patent door of —, (the place of requifition), after the crying of three feveral oyeffes, as ufe is; therefore the faid A, procurator forefaid, protested, That the faid C might be liable to the faid B, his conftituent, in the faid fum of — money forefaid of liquidate expenfes, incurred through failzie in his not payment of the principal fum above mentioned, requifition being duly made to him for that effect in manner above expreffed; and further, that he may be liable to the faid B for all coft, fkaith, damage, and expenfes he fhall happen to fustain or incur through the not payment of the principal fum above expreffed; and that it may be leifome and lawful for his faid conftituent to ufe all manner of execution and diligence, both perfonal and real, againft the faid C, for the fums above mentioned, the one but prejudice of the other. Whereupon, &c. Thefe things were done within —, betwixt the hours of — and — in the evening, after fun-fet, before and in prefence of, &c.

T I T L E VIII.

Of procuratories.

MY business in this title is not to inquire nicely into the several powers given to procurators, or what they are liable in if they do not perform in the express words of their procuratory or mandate; but only to set down some of the ordinary and most usual procuratories in particular cases, whereby a Notary-public may be enabled, from these examples, to form and draw up any other kind of procuratory whatever, according as the different business requires, and as his own good judgment shall direct.

Whoever reads Stair or Mackenzie their *Institutions*, will find a procurator or mandatar defined to be, *One who is employed to do or manage any business gratuitously*; and that most mandates are free, and may be refused, though precepts may not, when the party upon whom they are drawn hath power from the drawer; and that mandatars are liable for exact diligence, *et culpa levissima*, because, although the mandate be only *gratia mandantis*, yet the very nature of it implies diligence; but by the nature of the contract, mandatars, seeing their undertakings are gratuitous, ought only to be liable for such diligence as they use in their own affairs, and the mandatar ought to impute it to himself that he made not choice

of

of a more diligent person ; which our custom followeth : but still there must be *bona fides*.

By our practice, formally extended procuratories are requisite to authorise the Notary's deed in making resignation, premonition, and consignation, and requisition and attendance ; as has been seen in the preceding titles treating of these instruments.

Procuratories of resignation *in favorem*, are ordinarily adjected to dispositions, and run thus : “ And for effectuating the foresaid investment by resignation, I, by these presents, make and constitute *A* and *B*, and each of them, conjunctly and severally, my very lawful and irrevocable procurators, for me, and in my name, to resign, surrender, overgive, and deliver ; likeas I, by these presents, resign, surrender, overgive, and deliver, all and haill [*Here the lands are repeated ; then say*], lying as said is, together with all right, title, interest, claim of right, property, and possession, petitioner and possessor, that I, my heirs and successors, had, have, or any wise may claim or pretend thereto, or to any part thereof, in time coming, in the hands of my immediate superior or superiors of the same, presently being, or that shall happen to be for the time, or of his or their commissioners having power to receive resignations in his or their names ; in favour, and for new investment of the same to be made and granted to the said *C*, his heirs or assigns
“ needs

“ nees whatsoever, heritably and irredeem-
 “ ably, as said is ; and thereupon acts, in-
 “ struments, and documents needful, to ask,
 “ list, and raise, and generally all and sundry
 “ other things concerning the premisses, to
 “ do, use, and exerce, which, to the office of
 “ procuratory in such cases, by the law and
 “ custom of Scotland, is known to appertain,
 “ and which I might do myself if I were per-
 “ sonally present ; promising to hold firm
 “ and stable all and whatsoever things my said
 “ procurators, or any of them, in the pre-
 “ misses lawfully does, or causes to be done,
 “ without revocation.”

When an apparent heir who is not infest,
 disposes his lands, there is adjected to the
 disposition a procuratory for serving the dis-
 poner heir to his predecessor, and for resign-
 ing, thus : “ And because I am not yet in-
 “ fest and seised as heir to the said deceased
 “ *A* my father, in the lands, barony, and o-
 “ thers above disposed ; therefore I, by these
 “ presents, make and constitute *B* and *D*, and
 “ each of them, conjunctly and severally, my
 “ procurators, for me and in my name, to
 “ purchase and procure brieves forth of our
 “ Sovereign Lord’s chancery, for procuring
 “ me to be duly and lawfully served and re-
 “ toured nearest and lawful heir-male to the
 “ said deceased *A* my father, in the lands,
 “ baronies, &c. above disposed, or to any
 “ other of my predecessors who died last vest-
 “ ed and seised therein ; and to raise, and to
 “ cause

“ cause proclaim the brieves for that purpose,
 “ and to expedite the service, and to compare
 “ for me thereat, and to return the same to
 “ the chancellary, and to take instruments,
 “ and to do all other things requisite concern-
 “ ing the serving me heir in special and heir
 “ in general to the said deceased *A* my father,
 “ or others my predecessors, which I could
 “ do myself if I were personally present ; and
 “ afterward to procure me infeft therein, by
 “ raising precepts upon the said service ; and
 “ to cause registrate my seisin : and I being
 “ so infeft and seised, with power to my said
 “ procurators, conjunctly and severally, as
 “ said is, now as then, and then as now, to
 “ resign, &c. likeas I, if I were already in-
 “ feft in all of them, and then as now resign,
 “ &c.”

When the disposition of the lands is to the
 superior, the procuratory of resignation con-
 tained therein is *ad remanentiam*, thus : “ To
 “ resign, &c. in the hands, and in favour of
 “ the said *A* and his foresaids, *ad perpetuam*
 “ *remanentiam* ; to the effect that my right of
 “ property being consolidated in his person
 “ with his own right of superiority of the
 “ same, all and haill the lands, &c. and others
 “ above expressed, so holden, may remain
 “ and abide with him and his foresaids heri-
 “ tably and irredeemably perpetually in all
 “ time coming : and thereupon acts, &c.”

But it sometimes happens that these procu-
 ratories are omitted in the disposition ; in

R

which

which case procuratories *per se* (as they are called) are granted of the following tenor.

Procuratory of resignation of lands by one in the King's hands, in favour of himself and his heirs, with a reservation of his lady's liferent ; with some variations.

BE it known to all men by thir present letters, me *A* of ———, heritable proprietor of the lands and others under written, for the care and regard that the samen lands and others after specified may remain with my own posterity, and that the heritors thereof may continue in the surname of *A*, and for other good causes and considerations moving me, to have made and constitute ; likeas I, by thir presents, make, constitute, and ordain ——— ———, and ilk ane of them, conjunctly and severally, my very lawful and irrevocable procurators, for me, and in my name and upon my behalf, to compear at whatsomever place, day or time lawful, and there, be deliverance of staff and baston, as use is, with all condign reverence and due humility as becometh, to resign, surrender, overgive, and deliver ; likeas I, for me, my heirs and successors, resign, &c. (a) all and hail [Here insert the lands], together with all right,

(a) If there be any provisions or restrictions, you may add, " with and under the express provisions and conditions after specified."

title,

title, interest, claim of right, property, and possession, petitioner and possessor, which I, my heirs or assignees, had, have, or any wife may claim or pretend thereto, or to any part thereof, in the hands of our Sovereign Lord the King's Majesty, or his successors, my immediate lawful superiors thereof, or his or their commissioners, having power to receive resignations in his or their names; in favour, and for new infeftment thereof (a) to be

(a) If the procuratory be granted for new infeftment to be given the son, reserving the father's liferent, it will run thus: "to be made and granted to myself in liferent, and
"after my decease to G, my eldest lawful son procreate
"betwixt me and the deceased D my spouse, and the heirs
"lawfully to be procreate of his body, in fee; which failing, to return to me, my heirs-male lawfully to be procreate of my body in any subsequent marriage; which
"all failing, to my heirs or assignees whatsoever; with
"and under the express conditions and provisions after specified, to be contained in the said infeftment in manner
"under written: providing always, likeas it is hereby expressly provided and declared, That the foresaid infeftment to be granted to the said G my son, is and shall be
"in full contentation and satisfaction to him of all former
"provisions, bonds, obligations and others whatsoever,
"that he or his heirs and executors may any wise ask,
"claim, or crave of me, be virtue of the contract of marriage made and passed betwixt me and the said deceased
"D my spouse on the one and other parts, or any other
"manner of way whatsoever, (except my own good will
"allenary): and further, it is provided and declared, that,
"in case it shall happen the said G to depart this life without heirs of his own body, and that thereby the foresaid
"lands return to my other heirs-male to be procreate by
"me with any other lawful spouse; in that case the said

be made and granted to me, and the heirs-male lawfully procreate or to be lawfully procreate of my body, and the heirs whatsoever lawfully to be procreate of their body ; whom failing, to the heirs-female lawfully procreate or to be procreate of my body, and the heirs of their bodies ; the eldest heir-female being always obliged to marry a gentleman of the surname of *A*, or of any other surname, who, and the heirs to be procreate betwixt them, shall successively and perpetually in all time thereafter be obliged to take upon them, use, and carry the surname and arms of *A* ; wherein if they fail, they shall amit and tyne all benefit of the lands, barony and others above mentioned, both principal and warrandice, and the samen shall accresce and pertain to my next apparent heir or heirs of tailzie, who shall have right to the lands and others above specified, sicklike as if the party failing had

“ heirs male or female shall be holden and obliged to content and pay to ——— my daughters of the said first marriage, their heirs, executors, or assignees, the sum of ———, equally to be divided amongst them ; and in case any of my said daughters shall decease before marriage or majority, then the part of the daughter so deceasing shall accresce and belong to the daughter or daughters surviving, equally and proportionally among them ; which sum of ——— is and shall be in full contentation and satisfaction to them of all they can ask, claim, or crave be the decease of the said *G* : with the which provisions and conditions above written thir presents are granted by me, and accepted of by my said son and his forefairs, and no other ways. Acts, instruments, &c.”

never

never been infest therein, nor had had right thereto; and shall have power to pursue actions of reduction, declarators of adjudications, and all other actions necessary for establishing their rights of the lands and others above written in their person upon the said convention; and failing of heirs-female lawfully to be procreate of my own body, then to any other person or persons that I have already, or shall now or at any time hereafter nominate, design, and appoint my heir or heirs of tailzie, by a writ under my hand, to succeed to the lands and barony and others above rehearsed, and under such provisions, restrictions, and qualifications as shall be contained therein, which the persons so to be nominate shall be holden to perform and fulfil; and failing of such a nomination, or the samen being made and thereafter revoked or cancelled by me, (which shall always be in my power during my lifetime), then to my nearest heirs or assignees whatsoever, heritably and irredemably, in due and competent form: providing always, that the said heirs, as well male as female, of my own body, as the heirs to be contained in the said nomination, shall be obliged and liable; likeas, by the acceptation of thir presents, and infestment to follow hereupon, they oblige themselves to perform and fulfil the hail provisions, qualifications, restrictions, and reservations mentioned in a bond of provision granted by me, of the date —, and relative hereunto; and for fulfilling whereof this

present procuratory is granted : reserving always to *B* my spouse her liferent-right of the foresaid lands, and that in lieu and place, and in full contentation and satisfaction to her, of all whereunto she is provided by her contract of marriage, as is expressly provided in the disposition of the said lands and barony made by — to me, and charter following thereon ; which contract of marriage, the said *B* my spouse, by acceptation of the liferent and infestment foresaid, hereby reserved to her, doth *simpliciter* and absolutely discharge : And upon the said resignation, acts, instruments, and documents, one or moe needful, to take, ask, lift, and raise, and generally all other things necessary thereanent to do, which I might do myself if I were personally present ; promising to hold firm and stable all and whatsoever things that my said procurators, or any of them, in the premisses, lawfully does, but revocation. Registration, &c.

Procuratory for serving one heir to his father on a paper apart.

BE it known to all men by these presents, me *A*, now of *B*, eldest lawful son and apparent heir to the deceased *C* of *B*, to have constitute and ordained ; likeas I, by the tenor hereof, make, constitute, and ordain *D* and *E*, and ilk ane of them, conjunctly and severally, my very lawful and irrevocable procurators and special errand-bearers, to the effect

fect under written ; giving, granting, and committing to them, and ilk ane of them, conjunctly and severally, as said is, my very full, free, and irrevocable power, expresse bidding, mandate, and charge, for me, and in my name, to raise brieves forth of our Sovereign Lord's chancery, directed to the four ordinary macers before the Lords of Council and Session, and to the sheriffs and bailies *respective* of the sheriffdom of *L* and regality of *M*, specially constitute by our Sovereign Lord's commission, to the effect after specified, for obtaining me served and retoured nearest and lawful heir general and special to the said deceased *C* my father, in all lands, heritages, heritable offices, annualrents, and others wherein he died last vest and seised as of fee ; and to cause proclaim the said brieves, and me to be served and retoured heir foresaid ; and to retour my service to the chancery, and to obtain precepts upon my said service, for purchasing and obtaining me infest in the lands and others foresaid, and to cause put the said precepts to due execution, in all points ; and generally all and sundry other things, to do, use, and exerce thereanent, sicklike, and as freely as I might do myself if I were personally present, or that to the office of procuratory in such cases is known to appertain ; promising to hold firm and stable all and whatsoever things that my said procurators, or any of them, lawfully do or cause be done, but revocation. Registration for preservation, &c.

Procuratory

Procuratory of premonition and consignation.

BE it known to all men by these presents, me *A*, (*a*) heritable proprietor of the lands and others under written, and having undoubted right to the reversion thereof in manner after mentioned : Forasmuchas, (*b*) by contract of wadset, made, passed, and perfected betwixt me and *L*, on the one and other parts, of the date the —— day of —— years, I (for the causes therein

(*a*) If the reverfor be minor, the procuratory must be made with consent of his curators ; in which case say, “ with the special advice and consent of —— my curators, for their interest.” But if the reverfor be under pupillarity, the tutor acts alone ; and if he be nominated by the father, say, “ *C*, tutor nominate to *A* by the deceased *D* his father, conform to his letters of nomination dated ——.” But if he be a tutor of law, say, “ *C*, tutor of law served and retoured to *A*, conform to my retoured service dated ——.” And if he be a tutor-dative, say, “ *C*, tutor-dative to *A*, conform to my letter of tutory under the quarter-seal dated —— ;” and repeat the tutor’s name in its proper places.

(*b*) If the procuratory be to premonish an annualrenter to receive his money due by heritable bond, say, “ I, by my heritable bond dated ——, (for the causes therein specified), band and obliged me, with all convenient diligence, and upon my own proper charges and expenses, to duly, validly, and lawfully infest, vest, and seise *D*, his heirs and assignees whatsoever, heritably, and under reversion always in manner after specified, in all and hail an yearly annualrent of one hundred pounds Scots money, or in such an annualrent as should be due for, or agreeable and correspondent to the principal sum of two thousand pounds Scots money, by the laws and acts of parliament of this kingdom for the time, yearly, to be uplifted and taken at two terms in the year, Candlemas and Lammas, be equal portions, forth of all and hail
— my

therein specified) sold, annailzied, wadset, impignorated, and disponed, from me, my heirs, and all others my assignees, to and in favour of the said L, his heirs and assignees what-

“ my lands of —,” [*Here take in the lands*], “ lying
 “ within the parochin of —, and sheriffdom of —,
 “ or forth of any other lands and heritages pertaining to
 “ me, where-ever the samen lie within this kingdom, or
 “ forth of any part or portion thereof, first, best, and rea-
 “ dieft mails, farms, profits, and duties of the samen; re-
 “ deemable always the foresaid annualrent, —” [*Here
 take in the reversion verbatim, as in the heritable bond*].
 But if the procuratory be to premonish an adjudger to re-
 ceive his money due by adjudication, say, “ upon the —
 “ day of — years, O obtained decret and sentence of
 “ adjudication at his instance against me before the Lords
 “ of Council and Session, adjudging, decerning, and decla-
 “ ring the ground-right and property of all and hail”
 [*Here take in the lands adjudged*], “ to pertain and belong
 “ to him heritably, (under reversion, conform to act of
 “ parliament), for payment and satisfaction to him of the
 “ sums of money, principal, annualrents, and liquidate ex-
 “ penses therein contained, extending in hail, at the date
 “ of the said decret of adjudication, to the sum of three
 “ thousand pounds Scots money, *salvo iusto calculo*, and
 “ of the annualrent of the said accumulate sum from the
 “ date of the said decret of adjudication during the not
 “ redemption; and also in payment and satisfaction to him
 “ of the expenses of the infestment to follow thereupon,
 “ and composition to the superior of the said lands for his
 “ entry thereto; as the said decret of adjudication, of the
 “ date foresaid, with the abbreviate thereof, duly record-
 “ ed conform to act of parliament, more fully bears: con-
 “ form to which decret, and charter following thereupon
 “ from the said superior, the said O was, upon the —
 “ day of — years, duly infest and seised in the lands
 “ and others above written, as the said decret of adjudi-
 “ cation, charter and seisin, more fully proopt.”

foever,

soever, heritably, with and under the provision and condition of reversion after mentioned, all and hail, &c. [*Here take in the lands, as in the dispositive clause of the wadset-right*], (a) redeemable always the lands and others above expressed by me, my heirs, successors, or assignees, from the said L, his heirs and successors in the wadset-lands, and others above rehearsed, by payment making to them, &c. [*Here take in the tenor of the reversion verbatim, as in the contract; and then add*], as the said contract of wadset at more length bears. By virtue of which contract of wadset, and precept of feisin therein contained, the said L was duly infeft and seised in the lands and others above written; as his feisin, dated the — day of — years, duly registrate conform to the act of parliament, more fully bears. (b) And now seeing that

(a) But if the reversion be in a paper apart, you must here narrate it, and thereafter say, “as the said contract of wadset [or *heritable bond*] and letter of reversion in themselves more fully proposit.”

(b) If the procuratory be to premonish an annualrenter to receive money due by heritable bond, say, “And seeing that I am ready, willing, and desirous the foresaid yearly annualrent be redeemed from the said D, and to make payment, &c. *mutatis mutandis*.”

Others frame these procuratories of premonition in a shorter form, thus:

BE it known to all men, me —, heritable proprietor of the lands and others under written, and having right to the reversion after mentioned, [*leaving out the above narrative*], to have made and constitute — and —,

I am ready, willing, and desirous to redeem the said lands and others above written, from the said L, and to make payment to him of the sums of money above written, in terms of

——, and each of them, conjunctly and severally, my procurators, for me, and in my name, to pass, and, in presence of a Notary and witnesses, to premonish —— personally, or at his dwelling-place, to attend on Whitsunday next, betwixt noon and sun-set, at ——, (the place of redemption), there to receive from me, or my procurators in my name, upon granting a valid renunciation and grant of redemption of the subjects after mentioned, the sums of —— Scots money; and that for the lawful redemption, loosing, and outquitting from the said ——, of all and hail my lands of ——, [*Here insert the lands*]; which lands and others above written, with the pertinents, were disposed by me to the said ——, by contract of wadset betwixt us, of the date ——; in which contract it is provided, That the said lands and others above mentioned shall be redeemable by me upon payment of the sums of money, in the manner, and upon the premonition therein expressed: and to hear and see I am ready to perform the hail other articles incumbent upon me by the said contract of wadset. And further, I hereby grant full power to my said procurators, or any of them, to appear, at the time and place above written; and there to deliver, or offer to deliver, to the said ——, the foresaid sums of ——, on his granting the renunciation above mentioned; and, in case of his absence, or refusal to receive the sums of money, and grant the renunciation above written, and deliver up the foresaid contract, to consign the said sums in the hands of ——, and protest, that the hail lands and others above mentioned may be held as lawfully redeemed from him, his heirs and successors, in terms of the reversion above mentioned; and thereupon to take instruments, and to do every thing else that to the office of a procurator in such cases is known to appertain, or that I might do myself if I were personally present. And I consent to the registration hereof, &c.

the

the reversion above expressed ; therefore wit ye me the said *A*, (*a*) to have made and constitute, likeas I, by these presents, make, constitute, and ordain *Q* and *R*, and ilk ane of them, conjunctly and severally, as said is, my very lawful and irrevocable procurators ; giving, granting, and committing to them my full, free, plain power, expreis bidding, mandate, and charge, for me, and in my name, and upon my account and behalf, to pass to the personal presence or dwelling-house of the said *L* ; and there, in presence of a Notary and witnesses as effeirs, to make due and lawful intimation and premonition to the said *L*, to compear within (*b*), &c. [*Here insert the particular place of redemption*], upon Whitsunday's even next to come, in this instant

(*a*) And if the reverfor be minor, add, “ with advice
“ and consent of my curators above named, for their interest.”

(*b*) If it be a procuratory to premonish an adjudger to receive money due by adjudication, add, “ the parish-
“ church of —, within which the said lands and others
“ adjudged lie, upon the — day of — next to come,
“ betwixt sun-rising and sun-setting the same day ; and then
“ and there to accept and receive from me the said *A*, or
“ my procurators in my name, the foresaid sum of three
“ thousand pounds Scots-money foresaid, and other sums
“ due by the aforesaid decreet of adjudication ; an account
“ whereof you are hereby required and specially enjoined
“ to require from the said *O*, to the end the samen, in case
“ of his absence or refusal, may be consigned in manner after
“ mentioned ; and that for the lawful redemption,
“ loosing, and outquitting from the said *O*, all and hail the
“ lands and others above written.”

year

year of God, one thousand seven hundred and forty, betwixt sun-rising and down-passing thereof the same day, to receive and accept from me the said *A*, or my procurators in my name, upon delivery of a valid renunciation and grant of redemption, the foresaid sum of — Scots money ; and that for the lawful redemption, loosing, and outquitting from the said *L*, all and haill the lands and others above written, lying as said is ; and also to hear and see me the said *A*, or my procurators in my name, observe, fulfil, and implement to the said *L*, and his foresaids, the reversion above mentioned, in the haill points and articles thereof ; and in like manner to compear within, &c. (a) [*Here insert the place of redemption*], upon the said Whitsunday's even next to come ; and there, the samen day, betwixt the sun-rising and down-lapsing thereof, to really offer and deliver to the said *L*, or his procurator in his name, having his power for that effect, the foresaid sum of —, upon his giving, granting, and delivering a sufficient letter of renunciation and grant of redemption, containing a procuratory of resignation for resigning the same in my hands, and that for the real redemption, loosing, and outquitting of the said lands and others above rehearsed : and in case of the said *L* his ab-

(a) But if the procuratory be to premonish an adjudger, say, " within the said parish church of —, upon the said — day of — next to come."

S

fence,

fence, or refusal to receive the said sum, and grant the renunciation and grant of redemption aforesaid, containing the procuratory above specified, and deliver up the said (a) contract of wadset, and charter and infestment following thereupon, then and there to consign the same in the hands of —, and to protest, That the lands and others foresaid shall from thenceforth, and in all time thereafter, be habite, repute, holden, and esteemed lawfully redeemed, loosed, and outquit from the said L and his foresaids, conform (b) to the reversion above written; and that he shall be holden and obliged to fulfil the sament to me the said A, after the form and tenor thereof in all points; acts, instruments, and documents needful anent the hail premisses to ask, raise, lift, and take, and generally all other things needful thereanent to do, use, and exerce, that to the office of procuratory, in such cases, by the laws and customs of this realm, is known to appertain and belong, sicklike and as freely in all respects as I might do myself if I were personally present: all which I shall hold firm and stable, but revocation. And for the more security, registration for preservation, &c.

(a) And if to premonish an adjudger, add, “decreet of adjudication, and abbreviate thereof above written, with the grounds and warrants thereof.”

(b) And if it be an adjudication, add here, “conform to the acts of parliament anent legal reversions in all points.”

Procuratory

Procuratory of Requisition.

BE it known to all men, by these presents, me *A*, forasmuchas, (*a*) by contract of wadset, made, passed, and perfected betwixt *B* and me on the one and other parts, of the date —, the said *B* (for the causes therein specified) sold, annailzied, wadset, impignorate, and dispoñed, from him, his heirs, and all others his assignees, to and in favour of me the said *A*, my heirs and assignees whatsoever, heritably, with and under the pro-

(*a*) But if the procuratory be requiring a sum due by heritage bond, in that case the bond is narrated thus: “Forasmuchas *B*, by his heritable bond subscribed by him, of the date —, (for the causes therein specified), band and obliged him, his heirs and successors, duly and lawfully to have infeft, vest, and seised me, my heirs and assignees whatsoever, by charter and seisin, in due and competent form, heritably, under reversion in manner after specified, in all and haill an annualrent of two hundred merks Scots money, or such an annualrent as shall effeir and correspond to the principal sum of four thousand merks by any supervenient law for the time, yearly, to be uplifted and taken at two terms in the year, Candlemas and Lammas, by equal portions, forth of all and haill, &c.” [*Here insert the lands as in the heritable bond*], “lying within the parish of —, and sheriffdom of —, or forth of any part or portion thereof, first, best, and readiest mails, farms, profits, and duties of the same; and that by two several infeftments and manner of holdings: redeemable always and under reversion the said yearly annualrent by the said *B*, &c.” [*as in the bond*:] “as the said heritable bond, of the date foresaid, in itself more fully contains.”

vision and condition of reversion after mentioned, all and hail, &c. [*Here take in the lands as in the dispositive clause of the contract of wadset*]: redeemable always the lands and others above expressed, by the said *B* and his forefairs, from me the said *A*, my heirs and successors in the wadset-lands and others above expressed, by payment-making to me of the sum of — [Take in here the tenor of the reversion verbatim as in the contract; then add], Likeas the said *B*, by particular obligation contained in the said contract of wadset (*a*), in case I or my forefairs should happen rather to desire to have the foresaid sum of — repaid, than to retain the wadset right (*b*) above written, then and in that case the said *B* bound and obliged him, his heirs and successors whatsoever, thankfully to content, pay, and again deliver to me the said *A*, my heirs or assignees whatsoever, all and hail the foresaid sum of —, within, &c. [*Here insert the place of payment as specified in the contract*], at the term of Whitsunday's even, one thousand seven hundred and forty years, to the which term all requisition for the said principal sum was thereby suspended, or at any other term of Whitsunday's even thereafter I or my forefairs should please to have the same; upon requisition of forty days of

(*a*) If it be requiring a sum due by heritable bond, insert the words *heritable bond* here, and where it occurs.

(*b*) And insert here *right of annualrent*.

before

before to be made by me and my foresaids, or our lawful procurators in our name, to the said *B* and his foresaids for that effect, personally, or at their dwelling-places at the time, in presence of an Notary and witnesses, as effects; and in case of failzie after requisition, the said *B* thereby bound and obliged him and his foresaids to make payment to me and my foresaids of the sum of — money of liquidate expenses, by and attour the principal sum, but prejudice to me and my foresaids of our real right of the lands and others foresaid, ay and while we be completely satisfied and paid of the sums of money above written; I always and my foresaids, upon the receipt of the same, and full and complete payment thereof, granting the (*a*) lands and others foresaid to be lawfully redeemed, loosed, and outquit, from me and my foresaids, by the said *B*; and renouncing and discharging the said contract, and infestments following thereupon, in favour of the said *B* and his foresaids; and granting to them sufficient and valid renunciations, discharge, and grant of redemption for that effect; and delivering the said (*b*) contract, infestments, and haill rights and evidents of the said wadset, to the said *B* and his foresaids, to be cutted, cancelled,

(*a*) If it be requiring money due by heritable bond, say, "foresaid right of annualrent."

(*b*) And here say, "heritable bond, charters and infestments following thereupon."

and destroyed, or otherwise used and disposed upon at their pleasure, in time coming; as the said contract of wadset, containing obligation to infest, procuratory of resignation, clause of absolute warrandice, assignation to writs and evidents, mails, and duties, with the foresaid clause and obligation of requisition, precept of seisin, and several other usual clauses, at more length propoerts: and seeing that I am desirous rather to have the foresaid sum of — money repaid to me, than to retain the wadset-right above written; therefore wit ye me the said *A* to have made and constitute, likeas I, by these presents, make, constitute, and ordain *E* and *F*, and ilk ane of them, conjunctly and severally, my very lawful, undoubted, and irrevocable procurators and special errand-bearers, to the effect under written; giving, granting, and committing to them, and ilk ane of them, conjunctly and severally, as said is, my very full, free, plain power, expresse bidding, mandate, and charge, for me, and in my name, and upon my account and behalf, to pass to the personal presence or dwelling-house of the said *B*, and there, in presence of an Notary and witnesses as effectis, duly and lawfully premonish and require the said *B*, to compear within, &c. [*Here insert the particular place of redemption, as in the clause of requisition*], upon the term of Whitsunday's even next to come, betwixt sun-rising and down-passing thereof; and then and there to pay and deliver to me, or my procurators

rators in my name authorised for that effect, the foresaid sum of — money (*a*), under the penalty above mentioned, and upon payment to accept from me, or my procurators in my name, an valid and sufficient renunciation, discharge, and grant of redemption of the premises, together with the said (*b*) contract of wadset, infestments, and haill writs and evidents of the wadset-lands and others above mentioned, in favour of the said *B* and his foresaids, to be used and disposed upon by them as their own writs and evidents in all time coming; and that for the lawful redemption, loosng, and outquitting of the same, from me and my foresaids, *in perpetuum*: and in like manner, to compear within, &c. upon the said Whitsunday's even next to come, betwixt sun-rising and down-lapsing thereof, the same day; and then and there, for me, and in my name, and upon my account and behalf, to accept and receive from the said *B*, or any person impowered by him, the foresaid sum of —, and upon satisfaction and payment to deliver up to the said *B*, or his procurator above named, an valid and sufficient renunciation, discharge, and grant of re-

(*a*) If it be an improper wadset, or an heritable bond, say, "and bygone annualrents thereof resting preceding
" the said term."

(*b*) Or, "heritable bond, charter and seisin following
" thereupon."

demption

demption of the foresaid (a) wadset-right, together with the foresaid contract of wadset, infeftments, and haill writs and evidents of the said wadset-lands, to be used and disposed upon by him and his foresaids, as their own writs and evidents, in all time coming; and in case of the said B his absence or refusal, to protest, that he may be liable in payment to me of the said sum of — of liquidate expenses, by and attour the principal sum above mentioned, and for all cost, skaith, damages, and expenses I shall happen to sustain or incur through the not-payment of the said sum, in the terms of the clause of requisition above specified: acts, instruments, and documents, &c.

Procuratory by a creditor to require a sum due by a moveable bond bearing a previous requisition.

BE it known, &c. me A, forasmuch as B, by his bond, [*Here narrate the bond, as also the baill clauses therein specified relative to the clause of requisition*], as the said bond, of the date foresaid, more fully bears; and now seeing I am desirous to have the foresaid sum repaid to me: therefore wit ye me the said A to have made and constitute, likeas, &c. [*After inserting the procurators names, the place and time of comparance, as in the foregoing procuratory,*

(a) Or, “right of annualrent, together with the foresaid heritable bond, charter and infeftment following thereupon.”

add],

add], and upon payment, to accept and receive up from me, or my procurators in my name, authorised and impowered for that effect, the foresaid bond, with an valid and sufficient discharge thereof, in favour of the said *B* and his foresaids, to be cancelled, or otherwise used and disposed upon by him and his foresaids in all time coming; and in like manner to compear within, &c. and then and there, for me, and in my name, and upon my account and behalf, to accept and receive from the said *B*, or any person impowered by him, the foresaid sum of — Scots money of principal, and haill bygone annualrents thereof resting preceding the said term; and, upon payment and satisfaction, to deliver up to the said *B* the foresaid bond, with an valid and sufficient discharge thereof, to be cancelled, or otherwise used and disposed upon as his own writs and evidents in all time coming: and in case of the said *B* his absence or refusal, to protest, that he may be liable in payment to me of the foresaid sum of — money of liquidate expenses, by and attour the principal sum above mentioned, and of all cost, skaith, damages, and expenses I shall happen to sustain or incur through the not-payment of the foresaid sums, in the terms of the bond above mentioned: acts, instruments, &c.

It sometimes happens that dispositions or contracts of wadset bear a clause, That in case the rental of the lands fall so as they cannot
be

be set at the rent they paid formerly, the purchaser is obliged to make intimation thereof. And a procuratory or mandate for making such intimation will run thus :

I *A* do hereby give full power, warrant, and commission to *B*, to go to the personal presence of *C*, and intimate to him, That the lands of *D*, formerly belonging to him, and by him disposed to *E*, from whom I have right, after my utmost endeavour, cannot be set in tack to a tenant for the ensuing year for more than two hundred pounds Scots money ; and, in terms of a quality and clause in the disposition by the said *C* to the said *E*, to protest, that I shall not be accountable for any more than I receive ; and thereupon to take instruments in the hand of a Notary-public before witnesses, as effects. In witness whereof, &c.

T I T L E IX.

Of the lesser, or moveable Instruments.

IN the foregoing titles, I have endeavoured to instruct the Notary in such instruments, as it is necessary for him to be skilled in, touching the completing or extinguishing of heritable rights : it remains now to treat of those that are requisite or usual on other occasions. And as they cannot be well reduced to any regular

regular method, I shall treat of them, *either* as they are of a mixed nature, though moveable in themselves, yet relative to, or affecting heritage; *or* such as are used in the completion or transmission of moveable rights; *thirdly*, of instruments *ad factum præstandum*, and protestations of all kinds; and *lastly*, of those instruments that are now mostly in desuetude.

S E C T. I.

Of mixed Instruments.

THE instruments I have thought proper to distinguish by the above title are these :

- Instrument kenning a woman to her terce.
- of interruption.
- the vassal against the superior, anent irritant clauses in the vassal's charter, or on refusal of precepts of *Clare constat*.
- against teind-masters.
- of ejection and violent profits.
- a tenant against the master.
- against the Barons of Exchequer.
- of ratification.

I. As to the first of these, when there is no provision flowing from the husband in favour of his wife as a competent fee or liferent, then she

She must have recourse to the provisions of the law; that is, to a terce; which is the third of the tenements in which the husband died in-
 feft as of fee, provided in liferent to the wife surviving, by law or custom, though there be no provision or paction for that purpose. The original whereof is from that obligation upon the husband to provide for his wife; which therefore positive law hath determined to a third of his moveables, if there be children in the family; and if there be none, to a half: but in either case she hath a third of his tenements. But the relict of a person whose estate stands already affected with a terce to his predecessor's widow, can claim only for her terce, while the former tercer lives, a third of two thirds of the estate, called upon that account the *lesser terce*. Terce extends not to lands within burgh, or holden burgage, nor to feuduties, or other casualties of superiority, nor to reversions, or tacks, or patronage.

A terce is established by a widow's taking brieves out of the chancery, directed to sheriffs or bailies, &c. to call an inquest of fifteen sworn men, and thereby to serve the brieves. Which have two heads: the one, *That the bearer was lawful wife to the defunct*; the other, *that he died in fee of such tenements*. This is a pleadable brieve, and hath no retout, but service alone is sufficient enough to give the wife interest as other liferenters have. By *act 77. parl. 6. Ja. IV.* it was statute, "That
 " where the marriage was not questioned in
 " the

“ the husband’s life, and the widow was hold-
 “ en and repute his lawful wife in his time,
 “ no exception in the contrary shall be sustain-
 “ ed in the service of the brieve ; but she shall
 “ be served and enjoy the terce, till it be de-
 “ clared in a petitory judgment, that she was
 “ not a lawful wife.”

To the serving this brieve, it is not requisite to call the heir either personally or at his dwelling-house. After the brieve is thus served, the sheriff or bailie, &c. must also, if it be demanded, ken the relict to her terce; which is ordinarily done by causing the heir, if present, or one for him, if absent, cast lots or cavelis for determining where the division shall begin, whether at the sun or the shade; that is, whether the division shall begin at the east or west: and so the division of the tenements proceeds by acres, two befalling to the heir, and one to the relict; wherein there ought to be marches set, and an instrument taken thereupon in the hands of a Notary-public, which is equivalent to a seisin.

*Instrument taken on a precept from the masters of
session, kenning a woman to her terce.*

AT —, the — day of —, in presence of me Notary-public and witnesses after subscribing, compeared personally *A*, as attorney for, and in name and behalf of *B*, relict of the deceased *C*, and with us passed to the

the ground of the lands and others after mentioned; having and holding in his hands an precept of kenning, direct by *D* and *E*, two of the ordinary macers before the court of session, sheriffs in that part, lawfully constitute to the effect under written; which precept the said *A*, procurator foresaid, exhibited and presented to *F*, bailie in that part, specially constitute by the said precept to the effect after mentioned, requiring him to put the same to due execution; which request the said bailie finding reasonable, he accepted the said precept, and presented and delivered the same to me Notary-public, to be read to the witnesses present; which accordingly I did, and whereof this is the tenor: We *D* and *E*, two of the ordinary macers before the Lords of Council and Session, sheriffs in that part, lawfully constitute to the effect under written, to *F*, &c. our lovits, or any one of you, conjunctly and severally, bailies and officers in that part, specially constitute, greeting. Forasmuchas, by an inquest of fifteen sworn men, in a court holden at Edinburgh upon the — day of —, in obedience to briefes forth of the chancery, direct to us to the effect after mentioned, it is found, that the said *C*, husband to the said *B*, died last vest and seised as of fee, at the faith and peace of our Sovereign Lord the King, in all and hail the lands of —, [*Here narrate the lands and other beritage which belonged to the defunct*], lying within the parish of —, and sheriffdom of —;

——; and that the said *B* was lawful spouse to the said umquhile *C*, the time of his decease, which happened in the month of ——, in the year ——; and that therefore, by the law and practice of this realm, she ought to have a reasonable terce, or third part of all and haill the said lands of ——, and other lands and heritable subjects above mentioned, (excepting that part of the said lands of —— which are provided to *G*, relict of the deceased *H*, and mother to the said *C*, in liferent, conform to her contract of marriage, and seisin thereon, in her favour), kenned and set aside to her the said *B*, to be bruiked and possessed by her in liferent, during all the days of her lifetime: the persons who passed upon the said inquest have therefore served the said *B* to the shadowy third of all and haill the said lands and others above mentioned, (excepting as said is); which shadowy third or terce fell to her by lot, cast in our presence; as in the said *B* her service, and our act kenning her to her terce following thereupon, at more length is contained: we charge you therefore strictly, and command, that incontinent, this our precept seen, ye pass to the ground of the said lands of ——, and there acknowledge, cognosce, and ken, and enter the said *B*, or her attorney in her name, bearer hereof, in and to the said shadowy terce, or third part of all and haill the said lands of ——, lying as said is, (excepting always that part of the said lands of ——, life-

rented by the said G); and that by delivery to the said B, or her certain attorney or procurator in her name, bearer hereof, of earth and stone of the ground of the said lands, and other symbols usual and necessary in the like cases (a). The which to do we commit to you, conjunctly and severally, our full power by this our precept, which is subscribed and sealed by us, at Edinburgh, this — day of — years, before witnesses, &c. After reading of the foresaid precept, the said F, bailie foresaid, passed to all and sundry the said lands, particularly above mentioned, *respective et successive* after others; and there, by virtue of the said precept, and office thereby committed to him, (b) he acknowledged, cognosced, kenned, and entered the said B, for her liferent-use allenary during all the days of her lifetime, in and to her shadowy third part or terce

(a) Sometimes the terce in the lands is measured off, and divided from the other two parts by march-stones affixed; and the precept bears, “and also, that ye cause survey and measure the said lands, and set and divide off to the said B her shadowy third part thereof, and that ye affix and set meiths and march-stones in all places needful, for distinguishing and bounding the said shadowy third falling to the said B, from the other two thirds of the said lands, conform to the law and practice in the like cases.”

(b) “He measured off, divided, and bounded the said B her shadowy third part of the said lands; from the other two third parts thereof; and for that end affixed and set march-stones and meiths in all places needful, conform to the law and practice thereanent; and thereafter, &c.”

of

of all and haill the said unliferented lands of —, lying as aforesaid, wherein her said umquhile spouse died last vest and seised as of fee; and that by delivery to the said *A*, as procurator for, and in name and behalf of the said *B*, of earth and stone of the ground of ilk ane of the said lands *respective*. Whereupon, and upon all and sundry the premisses, the said *A*, procurator foresaid, asked and took instruments in the hands of me Notary-public subscribing. These things were done, &c.

II. Interruption is either natural or civil. Civil interruption is made by citation, or making a demand in a court of justice, or by a charge of horning.

Natural interruption is, when a proprietor owns or challenges his right by some fact, and takes instruments in the hands of a Notary upon it; which instrument, by *act* 19. *parl.* 1696, must be recorded in a particular register at Edinburgh, within sixty days after the date, otherwise it does not militate against singular successors, but only against the person instrumented. And of such instrument the tenor follows.

Instrument of Interruption.

AT and upon the bounds of the lands of —, the — day of — years, and of his Majesty's reign the — year, com-
T 3
peared

peared personally *A*, heritable proprietor of the foresaid lands, and passed with us to these parts and portions of new win out lands, within the marches after mentioned, commonly called —, *respective et successive*; having, &c. an charter made and granted by an Noble and Potent Earl, *B* Earl of —, of the date the — day of — years; whereby the said Noble Earl sold, annailzied, and disponed to *C* and *D*, conjunctly and equally betwixt them, their heirs and assignees, heritably, the ground-right and property of all and hail that part or portion of the lands and barony of — called —, comprehending the town and lands of — and —, with the teinds both parsonage and vicarage of the same, with houses, biggings, yards, tofts, crofts, mosses, muirs, meadows, grafings, shealings, outsets, insets, parts, pendicles, and universal pertinents thereof, as the famen is bounded, meithed, and marched, as follows, *viz.* [*Here insert the bounding as in the charter*], with full and free liberty of commonty and common pasturage, casting, winning, and leading fewel, feal, and divot, in all the mosses, muirs, and other bounds of commonty of the said barony of —, according to use and wont, for the use of the said *C* and *D*, conjunctly and equally, as said is, and their foresaids, and their tenants, servants, and possessors dwelling upon the said lands of —, all lying within the parish of — and sheriffdom of —: and, after reading of the said charter,

charter, the said *A*, as succeeding to the said *C* and *D*, his authors and predeceffors in the foresaid lands, by progress, represented, that *E*, his men, tenants, and servants, had most wrongously and unjustly incroached upon the said bounds, meiths, and marches of the said *A* his said lands of —, as they are expressed and set down in his author's bounding charter above expressed; and that by building houses and yards thereon, inclosing and tilling the ground, labouring and sowing the same within the bounds of the said *A* his property, at the said places commonly called —, to the extent and value of — bolls of yearly rent, which tends to the said *A* his great loss and damage; and therefore the said *A*, at the said respective places called — and —, made civil interruption against the foresaid intrusion and incroachments made by the said *E*, and his men, tenants, and servants, on his property; and that by throwing down some stones from the dykes, and pulling off some divots from the houses builded on the said bounds, and pulling up two or three handfuls of corn which was growing upon the said bounds; and protested, that the said *E* might be liable to him for all cost, skaith, damages, and expenses of law which may arise from his said intrusion and incroachments made upon his lands, and within his marches; and thereupon took instruments, at the said several places, in the hands of me Notary-public subscribing. These things were so done upon the

the ground of the foresaid bounds, betwixt the hours of — and —, or thereby, in the afternoon, upon the day, month, and year above set down, in presence of *F* and *G*, witnesses to the premisses specially called and required, &c.

III. Instruments are sometimes necessary against superiors, when there are irritant clauses contained in the vassal's charter, whereby, in case of sale of the lands, he is obliged to make the first offer of them to the superior, upon his giving as great a price as any other person. Such is the following.

Instrument by a vassal against his superior, upon making him the first offer of his lands.

AT —, &c. compeared personally *A*, heritor of the lands of —, lying within the parish of —, and sherriffdom of —; and with us passed to the personal presence of *B*, superior of the said lands; and there the said *A* did make true and lawful offer to the said *B* of the said lands of —, for the sum of —, which is the price truly offered by *C* for the same, in the terms of a prohibitory clause in the original rights and infeftments of the said lands, whereby it is provided and declared, That it shall not be lawful to the proprietors thereof to sell the same, without making the first offer of the same to the superior,

perior, they always giving as much for the said lands as any other person : and in respect the said *B* refused to accept of the said offer, and to make payment to the said *A* of the said sum of ——— offered therefore by the said *C*, as said is, therefore the said *A* protested, That the prohibitory clause and condition of the said original rights was purified and implemented by the offer above written, and that it may be lawful to him, or any of his successors in time coming, to sell and dispose of the lands and others foresaid at pleasure and freely, without any stop or hinderance whatsoever, to any person or persons they shall think fit and expedient. Whereupon, &c.

Instruments are likewise sometimes necessary against subject-superiors, refusing to grant a precept of *Clare constat* for infefting the heir of his deceased vassal. In that event the apparent heir must serve heir in special to his predecessor, and retour his service to the chancery : whereupon he gets a precept out of the chancery, to charge the superior to enter and receive the heir so retoured. With this precept, in company of a Notary and witnesses, he passes to the presence of the superior ; and, after offering the casualties due to him, he presents a precept of *Clare constat*, requiring, under form of instrument, That he the superior, in obedience to his Majesty's precept, would sign the same. And upon his refusal or delay, he brings back the precept with
the

the instrument to the chancery ; whereupon he gets out a second precept ; which the vassal in like manner offers under form of instrument to the superior. And if the superior still persists in his refusal to comply, upon production of this second precept at the chancery, with the instrument thereon, the vassal gets a third precept, commanding the superior to infest his vassal, with certification, if he do not comply, there will be a precept directed to the sheriff of the shire, or the superior of the person refusing, (if he has one), commanding him to infest the vassal. The first of these precepts, for distinction's sake, is called *Præcipimus* ; the second, *Meminimus* ; and the third, *Quod nisi feceritis*. And the using of this order is generally called the *running of the precepts*. If the superior shall refuse access to the vassal, then the instrument must be formally taken at the gate of his dwelling-house, and a copy affixed thereon : or if the superior is out of the kingdom, letters of supplement, at the instance of the heir served and retoured in special, will be granted by the Lords of Session, requiring the superior to give obedience to the precept directed forth of the chancery upon sixty days warning. Of which in the following examples.

Instrument

Instrument by an heir served, against his superior refusing to infeft him in his predecessor's lands.

A^T ———, &c. compeared *A*, eldest lawful son and heir served and retoured in special to the deceased *B*, his father; and with us passed to the personal presence of *C*, superior of the lands and others under written; having, &c. an precept directed forth of our Sovereign Lord's chancery, in the first form thereof, to the said *C*, commanding him to infeft the said *A* in the lands and others after specified; of which precept the tenor follows: *Georgius, Dei gratia, &c.* [*Here take in the precept verbatim, with the subscription and direction on the foot or back thereof; and then say*], And then and there the said *A* did exhibit, present, and give to me the said Notary-public, the precept above written, to be openly read, in presence of the said *C*, superior foresaid, and of the witnesses under written; and which accordingly I did. After open and public reading of which precept, the said *A* (to the end he might the more easily be infeft in the said lands) did likewise exhibit, produce, present, and offer, to the said *C*, superior foresaid, an precept of *Clare constat*, which he had ready formed, drawn, and extended, with pen and ink in his hand; and required him, in obedience to the foresaid precept, directed forth of his Majesty's chancery, to subscribe the same; and upon his signing thereof, instantly

stantly offered to pay the nonentry-duties. And in regard the said C, superior foresaid, would give no satisfactory answer to the said request, and refused to subscribe the said precept of *Clare constat*, and infest the said A in the lands and others foresaid, therefore he protested, That the said C might amit and lose the casualties of superiority of the lands and others foresaid during his lifetime, conform to the laws and daily practic of Scotland in the like cases; and further, that he might be liable to him in all cost, skaith, damage, and expenses he might any wise sustain or incur through the said C his not giving obedience to the precept above written. Whereupon, &c.

Instrument on the second precept.

AT —, &c. compeared personally A, procurator specially constitute by B, heir served and retoured to C, by virtue of his letters of procuratory of the date the — day of — years; and passed to the mansion-house of —, where D superior of the lands under written his family has their actual residence, and where the said D was personally within, as the said procurator and I the said Notary public were certainly informed by E and F his servants. And there the said A, as procurator for, and in name of the said B, declared he had attended at the gate of the said mansion-house since — hours before

before noon, but could get no access to the said *D*; and therefore he exhibited and produced, at the said gate, the precept of the chancery in the second form thereof; whereof the tenor follows: *Georgius, Dei gratia, &c.* [Here insert the precept as above directed.] And, conform to the said precept, the said *A*, as procurator foresaid, and in name and behalf of the said *B*, after he had caused me to read publicly the said letters of procuratory, and precept forth of the chancery, desired and formally required the said *D*, to give state and seisin of all and haill ———, lying ———, to the said *B*, as nearest and lawful heir of conquest to the deceased *C*, his brother, or to his attorney or procurator, bearer of the said precept, without delay: and the said *A*, as procurator, and in name and behalf foresaid, presented at the said gate an precept of *Clare constat*, to be authentically subscribed by the said *D*, before famous witnesses subscribing with him, with pen and ink, whereby the said *B*, as heir of conquest to his said deceased brother, might be infeft and seised in the said lands and others foresaid, conform to the said precept forth of the chancery; which precept of *Clare constat* the said *A*, as procurator foresaid, caused me publicly read. And in respect of the said *D* his refusal to subscribe the said precept of *Clare constat*, to the effect foresaid, the said *A*, as procurator, and in name and behalf of the said *B*, protested against the said *D*, for further orders, cost,

ſkaith, and damage, and that he ſhould amit and loſe his casualties of ſuperiority of the lands and others foreſaid, conform to the laws and conſuetude of this realm. Of the which proteſtations the ſaid *A*, as procurator foreſaid, affixed and left a copy upon the ſaid gate, after he had given ſix ſeveral knocks thereupon: and thereupon, and upon all and ſundry the premiſſes, aſked and took inſtruments in the hands of me Notary public ſubſcribing. Theſe things were done, &c.

Instrument on the third precept by an heir ſerved and retoured againſt his ſuperior out of the kingdom, at the croſs of Edinburgh, and pier and ſhore of Leith.

AT ———, &c. compeared perſonally *A*, meſſenger and procurator ſpecially conſtitute, by virtue of our Sovereign Lord's letters under his Highneſs's ſignet; having, &c. a precept directed forth of his Highneſs's chancery, in the third form thereof, to *D*, ſuperior of the lands after ſpecified, and to his bailies, for infeſting and ſeiſing of the ſaid *B* in all and hail, &c. to be holden of him as ſuperior thereof; as the ſaid precept, dated ———, at more length bears: and paſſed to the market-croſs of Edinburgh, pier and ſhore of Leith, *reſpective et ſucceſſive*, the one after the other; and there, after the crying of three ſeveral oyeffes, open proclamation, and public reading of the ſaid letters, at both the ſaid places,

places, *respective et successive*, as said is, the said *A*, messenger and procurator for the said *B*, lawfully commanded and charged the said *D*, superior, to infest and seise the said *B* in the lands and others above written, to be holden of him sicklike, and as freely in all respects, as his said deceased father held the same of before of him, conform to the said precept directed upon his retour ; and for that effect the said *A*, procurator foresaid, offered him a precept of seisin, which he had ready formed, with pen and ink in his hand, to subscribe the same, conform to the daily practis used in sicklike cases, within sixty days next after the said charge, because he was then forth of the realm ; with certification to him, if he failed, there would be a precept directed forth of the chancery to the sheriff of the shire for infesting the said *B* in the lands and others foresaid : and the said *A*, as procurator foresaid, affixed and left a just copy of the said letters at the said market-cross of Edinburgh, and another at the pier and shore of Leith, *respective et successive*. Whereupon, &c.

IV. It is likewise necessary sometimes to take instruments against teind-masters who delay the teinding of the corns ; and it appears by the narrative of the *act 73. parl. 6. Ja. VI.* That the labourers of the ground sustained great skaith and inconveniency through the default of the teinding of their corns in due time, by the malice of such as have titles or

tacks to such teinds, oftentimes causing the labourers of the ground to lose their corns, or fall in danger of spuilzie. Wherefore it is statute, That if the person having right to the teinds, fails to levy his teind timeously, the labourer, upon making premonition on three sabbath-days after the corns are cut down, which is by the *act* 48. *parl.* 11. Ja. VI. restricted to two sabbaths, may cause two honest neighbours teind upon oath the said corns. And thereafter, by the *act* 5. *parl.* 21. Ja. VI. it is appointed, that the teinding be at three several times, *viz.* the infield at one time, the bear at another time, and the outfield corn at another time; and that eight days intervene after each complete shearing. And by the *act* 9. *parl.* 22. Ja. VI. it is statute, That it shall be lawful to all heritors and labourers of the ground, eight days being expired after the complete shearing of every one sort of corn above written, or at least when the same are shorn till about a tenth part, to require the teind-master to come and teind the same within four days; and the teind master, if he dwell not within the parish, is ordained to have a servant for teinding, and to intimate his name and place of abode publicly the last Sunday of July, or first Sunday of August, yearly, in presence of the minister of the parish and parishioners, that no ignorance may be pretended thereof; which factor, so designed, shall be warned, either personally, if he can be apprehended, or by intimation to be

be made to the minister of the parish, and at the foresaid place to be designed for the factor's remaining : which requisition so made, and neither the teind-master himself, nor any person appointed by him coming to make thankful teinding, it shall be lawful to the said heritors and labourers of the ground to separate the stock from the teind, and to lead and carry their stock away, and either to stack the same within their barn-yards, or to place the same in their barns, leaving the teind upon the ground ; which they shall be holden to keep and preserve undestroyed or eaten by beasts for the space of eight days after the expiring of the time of the said requisition : which corns being so led and stacked, or placed in barns, and the teind being left on the ground, and preserved as said is, it shall be sufficient to liberate them of all danger of spuilzie, or wrongous intromission, which may be moved against them therefore in any time to come. Take the following example.

Instrument of requisition to a teind-master to teind corns in terms of the act of parliament.

AT, &c. compeared personally *A*, heritor of the lands of —, lying within the parish of —, and sheriffdom of — ; and with us passed to the personal presence of *B*, factor and servant constitute and designed by *C*, owner [or tacksmen] of the teind sheaves of the said parish of — ; and represented

to the said *B*. That eight days were fully elapsed and expired since the complete shearing of his haill corns (*a*) growing upon the said lands, occupied and possessed by him, this instant crop and year of God — ; and therefore the said *A*, owner of the said corns, desired and required the said *B*, factor foresaid, to come and make just and thankful teinding of the said corns, standing shorn upon the ground of the said lands of —, within four days next after this present requisition ; and in case he failed so to do, protested, That it might be lawful for him to separate the stock from the teind upon the ground, and to lead, transport, and carry away the said stock to his barn-yards, leaving the teind upon the ground, and so may be free from any action of spuilzie, or wrongous intromission with the said teinds ; and declared he should preserve the teind so left upon the ground, uneaten by beasts, for the space of eight days after the expiring of this requisition, conform to the act of parliament made thereanent. Whereupon, &c.

V. VI. Instruments are also requisite in ejection of tenants, and obtaining possession of the ground, and for violent profits against the tenants by the heritors, and against the heritors by the tenants renouncing their tacks.

Of old, the order of removing tenants was

(*a*) Or you may condescend upon such a species of corns.
this :

this : The master of the ground did verbally intimate to the tenant to remove at the next Whitsunday ; and the only solemnity requisite was, That before the said term he appeared before the door of the tenant, and broke a lance there, as a symbol of breaking the tacit relocation betwixt them ; whereupon, the second day after Whitsunday, he came *brevi manu* and expelled the tenant, or at least laid out some of his goods, to complete the solemnity of his removing. Hence arose many quarrels, violences, and breaches of the public peace, as when the tenant had any reason or pretence why he could not remove, or otherwise was unwilling, and not compelled by law or public authority, but by private force.

For remeid whereof, that excellent statute concerning warning and removing of tenants was made, *parl. 6. Q. Mary, act 39.* prescribing the order of removing thus : “ That
“ the master of the ground give a precept of
“ warning in writ, commanding his officer,
“ (which may be any person he pleases), for
“ whose name a blank is left in the precept,
“ to go, forty days preceding Whitsunday,
“ and intimate to the tenant, That he remove
“ himself, his family, subtenants, goods, and
“ gear, at the said term, and leave the tene-
“ ment void and rid that the warner may enter
“ into possession.” This may be done either personally, or at his dwelling-house, and the officer must leave a copy of the said precept
affixed

affixed upon the ground of the said land; and by the same space it must be done at the kirk-door, at the time of dissolving the congregation from the first sermon, leaving a copy thereof affixed upon the said door: all which must be done before two witnesses required for that effect, and executions made conform by the officer; which, without any other instrument or solemnity, doth sufficiently prove, unless it be improven. Upon this order the pursuer hath a privileged action, upon six days warning only, without continuation; and after having obtained decret of removing, and raised horning thereon, and caused execute the same against the tenant, if he still wilfully refuse to remove, the master will get letters of ejection, direct, by deliverance of the Lords, to the sheriff of the shire, for ejecting him. And as at this ejection there is ordinarily a Notary present, the master takes instruments in his hands, upon the tenant's being ejected, and his getting possession. But if the master rather chuse to insist for violent profits against the tenant, than to eject him; after having obtained decret of removing, and executed horning thereupon, he takes instruments in the hands of a Notary, and protests for violent profits, and then raises a process for the same before the judge-ordinary against the tenant.

On the contrary, if a tenant, after expiring of the terms of his tack, designs not to continue the possession, he must subscribe and deliver

liver to his master, forty days before the term of Whitsunday, a renunciation of his tack and possession ; consenting that he enter *brevi manu*, without hazard of ejection ; whereupon the tenant must take an instrument in the hand of a Notary, as a solemnity requisite ; which is sufficient to instruct the overgiving, as being the habile way approven in law. Albeit in other cases, not approven in law, instruments of Notaries prove not the deed of the party, in this cause it avoideth the tack, and is probable by instrument if the tack be expired ; but during the tack the instrument will not prove the acceptance of the renunciation. See the three following examples.

Instrument of ejection and possession.

AT —, &c. compeared personally *A*, heritable proprietor of the lands and others under written, with *B*, sheriff-depute of the sheriffdom of —, as lawfully charged, by virtue of our Sovereign Lord's letters of ejection, dated and signet —, to the effect under written, by *C* messenger, as the said letters of ejection and execution of the charge, of the date —, at length bear ; and passed with us to the mains and manor-place of —, presently possessed by *D* ; and there the said *B*, conform to the said letters of ejection, and charge given to him for that effect, not only lawfully ejected, flitted, and removed the said *D*, and *E* his spouse, their bairns, servants, and family,

mily, goods and gear, forth and from their pretended possession of the said mains and manor-place of —, biggings, yards, orchards, parts, pendicles, and pertinents thereof, by ejecting and openly casting forth of the said manor-place, the insight plenishing of the said *D* his house, and outputting themselves and servants forth thereof, and the drowning out of the said *D* his fire, as use is in the like cases; but also put the said *A* in the possession of the same, to the effect he and his tenants may enter to the bruiking, enjoying, and possessing thereof, as his own proper heritage, in all time coming, by kindling and inputting fire, in the said *A* his name, within the fire-house of the said manor-place, and by delivering the keys of the said house, barns, stables, and other office-houses, in and about the said place, conform to the said letters of ejection, laws, and practic of this kingdom, in all points. Whereupon, and all and sundry the premisses, &c.

Instrument the master against the tenant for violent profits.

AT —, &c. compeared personally *A*, heritor of the town and lands of — (*a*); and with us passed to the personal presence (*b*)

(*a*) Or, “*C*, as procurator for *A* of —, whose power of procuratory was clearly known to, and understood by me Notary-public subscribing.”

(*b*) Or, “dwelling house.”

of

of *B*, tenant and possessor of the said town and lands ; and there represented, That whereas the said *A* had caused duly warn the said *B*, by virtue of a precept of warning, and thereupon had pursued a process of removing before the sheriff of —, in which he had got a decreet of removing against the said *B*, and had thereupon raised letters of horning, and by virtue thereof caused charge him to remove ; and yet, notwithstanding of all which, the said *B* did continue violently to possess the said town and lands of —, contrary to all law and justice, and in high contempt of his Majesty's laws and letters above written, issued out against him in his Majesty's name, upon which he is charged to remove, as said is : and therefore the said *A* (*a*) protested, That the said *B* might be liable, not only in violent profits, but also for all cost, skaith, and damage to be sustained through the said *B* his violent possession in manner foresaid. Whereupon, &c.

Instrument taken by a tenant upon giving in a renunciation to the heritor.

AT, &c. compeared personally *A*, tenant and possessor of the town and lands of —, heritably pertaining and belonging to *B* ; and with us passed to the personal pre-

(*a*) Or, "*C*, procurator foresaid."

fence

fence (a) of the said *B* (b); having and holding in his hand an valid and formal renunciation of the said town and lands of —, duly subscribed by him, of the date the — day of — years: whereby the said *A*, tenant foresaid, (for the causes therein specified), renounced, discharged, and *simpliciter* upgave, from him, his heirs, and others therein mentioned, all right, title, and interest, tacks, kindness, good-will, property, and possession, which he had, has, or any wise may pretend to have to his occupation of the said town and lands of —, lying within the parish of —, and sheriffdom of —; and that to and in favour of the said *B*, heritable proprietor thereof, and his heirs and assignees; with power to them, and their men, tenants, servants, subtenants, and others in their names, peaceably to enter thereto at the feast and term of — next to come, occupy, labour, set, use, and dispose thereupon, in all time coming thereafter, but any precept of warning, or decret of removing; and thereby band and obliged him, his heirs, executors, and successors, to flit and remove himself, his wife, bairns, servants, family, subtenants, cottars, goods and gear, forth and from the occupation of the lands, houses, biggings, yards,

(a) Or, “dwelling-house.”

(b) Or, “*D*, chamberlain or factor to the said *B*, as “he who is impowered by letters of factory from him to “output and input tenants, and to receive renunciations of “possessions from them.”

and

and pertinents thereof above written, at the said term of — next to come; as the said renunciation more fully bears. After production, exhibiting, and public reading of the said renunciation, the said *A*, tenant foresaid, did give up and deliver the same to the said *B* (*a*), and declared he would flit and remove himself, and his foresaids, from the possession and occupation of the said lands, at the said term of — next to come, and leave the same void and rid for the said *B* and his foresaids, to be possessed by them in all time thereafter; and protested, That he might be free thereof, and from payment of any rent therefore, in all time coming, in respect of the renunciation above written; and that it may be leisome and lawful to him to leave the same at the said term, and to go live and reside where he should think fit thereafter. Whereupon, &c.

VII. To these may be added the following instrument.

Instrument taken against the Barons of Exchequer at passing a signature of lands.

AT —, &c. in presence of the Right Honourable *L*, Lord Chief Baron of his

(*a*) Or, “*D*, chamberlain foresaid, for the use of the said *B* ;” or, “ did leave the same at the said *B* his dwelling-house, [*or at the dwelling-house of the said *D*, chamberlain foresaid, for the use of the said *B*], because he could not be personally apprehended.*”

X

Majesty's

Majesty's exchequer in that part of the kingdom of Great Britain called Scotland, and remanent Barons of his Majesty's said exchequer, sitting in judgment, and also in presence of me Notary-public, and witnesses after named, compeared personally *A*; and there declared, That he having purchased the lands of *B*, salmon-fishing upon the water of *C*, and heritable office of justiciary within the said bounds, from *D*; and, upon his resignation, procured a signature past his Majesty's royal hand, containing a *Novodamus*, and an erection of the lands, fishing, and heritable offices, and others therein contained, in a free barony; and their Lordships having been pleased, upon the application of *E*, *F*, *G*, and other parties pretending to have interest in the said matter, to cancel and roll out the clause containing the said office of justiciary out of the said *A* his signature, therefore he did protest, That the doing thereof might no wise prejudice his right nor possession of the said office of justiciary in time coming, and that his protestation might be recorded in the books of exchequer: which protestation was admitted and received by the said Lord Chief Baron, and remanent Barons of Exchequer, and ordained to be recorded in the exchequer-books; and their Lordships reserved to the said *A*, to prosecute and pursue a declarator of his right before the judge-ordinary, as accords, notwithstanding of the cancelling or rolling out of his signature the foresaid office of justiciary.

Whereupon,

Whereupon, &c. These things were done in the high exchequer-house of the new session-house of Edinburgh, betwixt the hours of — and — before noon, place, day, month, year of God, and King's reign *respective* above written, before and in presence of —, —, —, and —, witnesses to the premiffes, &c.

VIII. We may also to these join this other instrument.

Instrument of ratification on the back of the deed ratified.

AT —, &c. The which day, in presence of *A*, one of his Majesty's justices of the peace in the shire of —, and me Notary-public, compeared judicially the within designed *B*, and there, outwith the presence of the also within named and designed *C*, her husband, judicially ratified, homologated, and approved the within written discharge and renunciation, [*or disposition and assignation, or other deed so ratified*], in the haill heads, articles, and clauses thereof; and gave her solemn oath, as she should answer to God, that she was no wise duced, coacted, nor compelled to the making, granting, and subscribing of the foresaid discharge and renunciation, nor of this present ratification thereof; but that she did the same of her own accord, free will and mo-

tive ; and that she shall never come in the contrary thereof, nor quarrel, impugn, nor offer to reduce the same, upon the head of fraud, force, circumvention, privilege of revocation, or upon any other ground, account, or reason whatsoever, directly or indirectly, in judgment or outwith the same, in time coming. To the which oath the said *A* interponed his authority. Whereupon, and all and sundry the premisses, *D*, as procurator for the within designed *F*, asked and took instruments in the hands of me Notary-public subscribing. And in testimony and verity of the haill premisses, the said *B*, and the said *A*, justice of the peace foresaid, and I the said Notary-public, have subscribed these presents, place, day, month, &c.

S E C T. II.

Of instruments of possession and intimation.

AS infeftments of heritage are completed by an instrument of seisin ; so dispositions to moveables are completed by delivery of the moveables, and an instrument taken thereon: and as, in the right of lands, the last disposition with the first infeftment will be found preferable ; so, in moveables, the last disposition with the first instrument of possession by virtue thereof (*ceteris paribus*) will have the preference. But a disposition to moveables,
and

and an instrument of tradition thereon, cannot be said to be a real transmission of the property, if the possession be retained, and the disponent's liferent reserved; as was found 17th December 1675, creditors of Masterton *contra* creditors of Thin, observed by Stair. And, even where symbolical possession is taken, if the disponent shall again dispoise to a third party, and that party be put in the natural possession; if no fraud be qualified, this last will be preferred: so that in dispositions of this nature, not only tradition, but likewise possession is requisite to the full accomplishment of the disposition.

Instrument of Possession.

AT, &c. compeared personally *A*, to whom, and in whose favour the disposition after mentioned, of the date —, and containing therein a clause of possession, is made and granted by *B* (*a*); and with us passed to the personal presence of the said *B*, in his dwelling-house of —; having, &c. the said disposition, whereby, for the causes therein spe-

(*a*) But if the disposition contains precept of possession, and the possession be given by a commissioner, say, "containing the precept of possession after inserted, is made and granted by *B*, who with *C*, commissioner specially constituted by the said precept of possession, passed with me Notary-public, and witnesses aforesaid, to the dwelling-house of *B*, having, &c.

cified, the said *B* sold, assigned, and disposed, from him, his heirs, executors, and all others his assignees, to and in favour of the said *A*, his heirs, executors, and assignees, all and haill his insight household plenishing, such as beds, chairs, hangings, tables, table-cloths, napkins, cabinets, trunks, chests, presses, feather-beds, blankets, sheets, cods, codwares, looking-glasses, chests of drawers, chimneys, candle-sticks, plates, trenchers, spoons, knives, and forks, and generally, but prejudice of the specialty foresaid, all gold, silver, brass, copper, pewter, iron and timber work, and haill other goods and gear, of whatsoever kind, nature, or denomination the same be, pertaining and belonging to the said *B*, and in his custody and possession, within his said dwelling-house presently possessed by him; and also all horse, nolt, sheep, and all other cattle, plough-gear, instruments of husbandry, and every other sort of outlight plenishing, of whatsoever kind or denomination the same may be, upon his possession of —, belonging to him; all specified and contained in a particular inventory subscribed by him, of the date of the said disposition, and therewith delivered up by him to the said *A*, and which is thereby declared to be a part of the said right and disposition, and therein holden as repeated *brevitatis causa*; as the said disposition, containing (a) clause of possession, clause

(a) “ Precept of possession,” if there is one ingrossed.
of

of warrandice, and several other clauses, in itself more fully bears: and sicklike, having and holding in his hands the particular inventory above mentioned, of the date of the said disposition, containing the whole particular goods, gear, plenishing, and others therein mentioned; as the samen also more fully bears: which disposition (a) and inventory above mentioned, the said *A* exhibited and presented to the said *B*, humbly requiring him, in terms of the above clause of possession, *ex propriis suis manibus*, to give and deliver to him real, actual, and corporal possession of the household plenishing, and other goods and gear above expressed, contained in the said disposition and inventory above written. Which request and desire being just and reasonable, the said *B* accepted, and received the said disposition and inventory into his hands, and gave the same to me Notary-public, to be read and published, in presence of the witnesses after named. All which accordingly I did (b). After reading and publishing of the which

(a) If possession be given by a commissioner, say, "above written, containing therein the said precept of possession and inventory above mentioned, the said *A* exhibited to the said *C*, requiring him to put the office committed to him by the said precept, to due execution. Which request being found reasonable by the said *C*, he accepted of the said disposition and inventory in his hands, and delivered the same to me Notary-public, &c."

(b) If possession is given by a commissioner in virtue of a precept of possession, say, "and of which precept of possession

which disposition (*a*) and inventory, in manner foresaid, the said *B*, for implementing, completing, and fulfilling of the foresaid right

“ possession the tenor follows: And to the effect the said
 “ *A* may be put in the actual and corporal possession of the
 “ said household plenishing, and others above disposed, I
 “ the said *B*, by these presents, make, constitute, and ordain you —, and ilk ane of you, conjunctly and severally, my very lawful, undoubted, and irrevocable procurators, actors, factors, and special commissioners, to the effect under written; hereby charging and requiring you, and ilk ane of you, conjunctly and severally, as said is, that incontinent, upon sight hereof, you pass to my dwelling-house, where the household and outlight plenishing, and others above disposed are, and there give to the said *A* real, actual, and corporal possession, of all and haill the household and outlight plenishing, and others above disposed, contained in the inventory above specified, and here holden as repeated *brevitatis causa*; and that by giving and delivering to the said *A*, or his certain procurator or procurators in his name, bearers hereof, of some parcels or pieces of the said household and outlight plenishing, and of some of the several species of the said cattle, as symbols for and in name of the whole, as use is; and this in no wise ye leave undone. The which to do, I commit to you, and ilk ane of you, conjunctly and severally, my commissioners in that part foresaid, my free and irrevocable power, by these presents. In witness whereof, &c.”

(*a*) If possession be given by a commissioner, add, “ and precept of possession therein contained, the said *C*, commissioner foresaid, gave and delivered to the said *A*, real, actual, and corporal possession of the goods, gear, and others above written, contained in the disposition and inventory above expressed; and that by delivery, &c. after the form and tenor of the said disposition, and precept of possession therein contained, and inventory above mentioned, in all points, none opposing, &c.”

and

and disposition, gave and delivered to the said *A*, *ex propriis suis manibus*, real, actual, and corporal possession of the household furniture, and insight and outfight plenishing above specified, and particularly enumerate and expressed in the foresaid disposition and inventory above mentioned; and that by giving and delivering to the said *A*, a particular species of all or most of the several sorts of plenishing, goods, cattle, and others above disposed, as use is, all to be bruiked, enjoyed, and possessed by the said *A*, and his foresaids, in time coming, conform to the tenor of the disposition and inventory above mentioned, in all points, none opposing or contradicting the same. Whereupon, &c. Thir things were done at and within the said *B* his dwelling-house, where the goods, gear, outfight and household plenishing, and others above written then were, betwixt the hours of, &c.

Instrument of vendition of ships being of the same nature, take an example.

Instrument of vendition.

AT —, &c. compeared personally *A*, and passed with us to the pier and harbour of —, where the ship called the — of — was lying, and likewise to the personal presence of *B*, shipmaster there, and sole owner of the said ship; having, &c. principal letters of vendition, of the date —, made and granted

granted by the said *B* to the said *A*; whereby, for the causes therein specified, the said *B* sold, assigned, and disposed, in favour of the said *A*, his heirs, executors, and assignees, all and haill an just and equal — part of the said ship, with an just and equal — part of her haill masts, sails, anchors, cables, tows, float-boat, rigging, and furniture thereto belonging, with an just and equal — share of the haill freights and profits of the said ship, from and after the date of the said vendition; as the samen more fully bears. Which vendition above written, the said *A* did exhibit and deliver to me the said Notary-public, to be read in presence of the said witnesses; which I did. After public reading of the which vendition, the said *A* required and desired the said *B*, *propriis manibus* to put him in the possession of the said just and equal — part of the said ship, float-boat, masts, sails, anchors, cables, tows, and others above written. Which request and desire being just and reasonable, the said *B* acquiesced in, and *propriis manibus* gave and delivered to the said *A*, real, actual, and corporal possession of an just and equal — part of the said ship, float-boat, masts, sails, cables, anchors, tows, and others above written, by giving and delivering to him the helm-pin, best anchor, ring, oar of the float-boat, and a piece of the cable in his hands, and the main-mast and one of the sails in his arms, as use is. Whereupon, and all and sundry the premisses, the said *A* asked and took
instruments,

instruments, &c. These things were done on board the said ship, lying in the said harbour of —, betwixt the hours of — before [or after] noon, place, day, month, &c.

All moveables, or rights, whether heritable or moveable, not completed by infestment, or which are perfect without infestment; the current profits of heritable rights completed by infestment, actions, bonds, &c. may be conveyed and transmitted by assignation; and he who grants the assignation is called the *cedent*, and he who receives it, *assignee*. Under assignations are likewise comprehended translations, when the assignee transfers or passes over his right to a third party; and retrocessions or repositions, restoring the cedent to his former right. But neither of these are complete valid rights, until they be intimate to the debtor by the party having right, or his procurator, in presence of a Notary and two witnesses, and instruments taken thereupon by the party or procurator in the hands of the Notary.

Intimation is a legal and solemn deed, made by, and given under the hand of a Notary-public, in presence of two or more witnesses specially required thereto, to a party, either personally or at his dwelling-house, to put him *in mala fide* to do or transact any thing against, or prejudicial to what is contained in the said instrument of intimation.

By a *legal and solemn deed* is not to be understood,

stood, that intimation is such a legal diligence as can be prevented and excluded by another diligence; but only as fulfilling and completing of one's right. For though it may be thought, that the intimation of an assignation, &c. was formerly only used to put the debtor *in mala fide* to pay to the cedent or any other assignee; nevertheless now it is become a requisite solemnity; for in the case where there are several assignations to the same debt, the last assignation, being first intimate, will have the preference: but still this does not proceed from the intimation being an exclusive legal diligence, but only as a full accomplishment of the assignation.

A party cannot without a legal intimation be *in mala fide*. For his knowledge of such and such an assignation, translation, or the like, which ought formally to be intimate to him, even although he confessed he knew it, cannot prejudice him; seeing it was not made known to him by the law: for as the party's knowledge is not equivalent to a formal intimation, one cannot be bound or obliged to know what was not necessary for him to know.

Although intimation be by our proper custom a necessary solemnity, yet there are several ways of intimating assignations, which have the same force and effect as if done by an instrument under the hand of a Notary-public. For any legal diligence, such as an arrestment, a charge of horning, or a process
upon

upon the assignation, will be a sufficient intimation.

As also, intimation is not necessary to legal and judicial assignations, such as apprisings and adjudications; because they are passed and expedite publicly.

Marriage is likewise a legal assignation requiring no intimation: for thereby all the moveable debts of the wife are stated in the husband *jure mariti*, without other intimation than the marriage. And by a decision, 2d December 1674, Craig *contra* the Laird of Wedderly, observed by Stair and Dirleton, *decis.* 195. intimation was not found necessary to a reposition by the assignee to the cedent, seeing the assignation was by a wife in her contract of marriage, which requires no intimation but the marriage; and therefore the husband's reposition to her needed no intimation.

Such rights as require possession to complete them, and are perfected by use of payment or possession, need no other intimation; as was found by a decision the 18th January 1628, L. Halkerton *contra* Falconer, observed by Durie; where, in the case of an heritable bond, the getting payment of some years annualrent, preferred the assignee to a former arrester, though there was no instrument of intimation.

Nevertheless it is to be observed, that an inhibition is not equivalent to an intimation, inhibitions being designed not so much for

publication as for execution, and having only force against immoveables; as was found in the case, *L. Westeraw contra Williamson* and Carmichael, 14th March 1626, observed by Durie.

Where there are many *correi debendi*, it is safest to intimate to them all: for although intimation made to one will be sufficient, yet it cannot exclude payment made *bona fide* by another of the debtors, to whom no intimation was made.

Bills of exchange, and orders by merchants to make payment, need not be intimated; because in commerce we are governed by the law of nations.

Assignations to reversions, or bonds for granting reversions, renunciations of wadsets, or grants of redemption, which by *act 16. parl. 1617*, ought to be registrated in the register of reversions, need no intimation, that register being designed not so much for conservation of these rights, where the principals are not detained, as for publication thereof to all parties having interest, which is a sufficient intimation.

The instrument of intimation must bear the production of the assignation, otherwise it will be null; as also, it must bear the hour of the day in which the intimation was made: for if it should not express the hour, it will only prove to have been done on that day; and if there be a competition, and another instrument

strument have the hour, that one will be preferred: and in case of both instruments having the hour, he who is first will be preferred; for in that event, *prior tempore potior jure*: and by a decision, 30th January 1629, Davidson *contra* Balcanqual, observed by Durie, in a competition betwixt an assignee and arrester, where the hour was inserted both in the arrestment and in the instrument of intimation, the Lords preferred the arrester, in regard the arrestment preceded the intimation by the space of two hours; and Durie further adds, "The reason specially was, because of the priority of the hour: which the Lords found in this case to be material; for, after that moment of arrestment, neither could the common debtor do any thing in prejudice thereof, neither could the intimation make any space thereafter affect the debt to the assignee, it being affected of before to the arrester: and the intimation and arrestment bearing their hours, it was found there need no other probation to prove their priority."

My Lord Stair in his *Institutions*, p. 378. speaking of this case, says, That this distance was too narrow, for the executor and witnesses may mistake the present hours; and adds, That three hours were a fitter distance to prefer. By a decision, 5th January 1681, Chiesly *contra* Chiesly, observed by Stair, instruments of intimation of assignments were found not

Instrument of intimation.

AT, &c. compeared *A*, as procurator for the within designed *B*, whose power, &c. and with us passed, *respective et successive*, (a) to the personal presence of the within designed *C* and *D*, principal and cautioner within named ; having and holding in his hands (b) the principal bond within narrated, made and granted by them to the within designed *E*, with the principal assignation thereto granted by the said *E* within written, of the date, tenor, and contents within mentioned (c) :
which

(a) Or, if the debtors are not apprehended personally, say, "to the dwelling-houses of, &c."

(b) If the instrument be on a paper apart, say, "an bond and obligation granted be the said *C* and *D*; of the date —, whereby, for the causes therein specified, they band and obliged them, &c." [*Here narrate the tenor of the bond, and then add*]; "as the said bond, of the date foresaid, more fully bears ; as also, having, &c. an assignation made and granted by the said *B* to him, dated —, &c." as in the assignation.

(c) If it be an instrument of intimation of a retrocession, add, "And sicklike having, &c. an retrocession made and granted by the said *J*, to the said *K*, of the date —; whereby, for the causes therein specified, he retrocessed, restored, reponed, redisponed, and again assigned, to and in favour of the said *K*, his heirs, executors, or assignees, the foresaid principal sum of —, with the sum of — money foresaid of liquidate expenses, incor-
" red

which bond and assignation above narrated, the said *A* delivered to me Notary-public, to be publicly read over and intimate : and which being accordingly done, to the said *C* and *D* (*a*), personally present, the said *A*, as procurator foresaid, protested, That the said assignation was duly and legally intimated, and

“ red through failzie ; together also with the hail bygone
 “ annualrents of the said principal sum resting owing, and
 “ in time coming during the not payment thereof ; with the
 “ said bond itself, hail heads and clauses thereof, letters
 “ of horning and caption, and hail other diligence follow-
 “ ing, or that might follow thereupon ; and surrogated and
 “ substituted him and his foresaids in his full right, vice,
 “ and place thereof, for ever ; as the said retrocession, of
 “ the date foresaid, more fully bears.”

If it be intimating a translation, say, “ Likeas having, &c.
 “ an translation made and granted by the said *B* to *M*, of
 “ the date — ; whereby (for the causes therein specified)
 “ the said *B* assigned and transferred, from him, his heirs,
 “ and all others his assignees, to and in favour of the said
 “ *M*, his heirs, executors, or assignees, the foresaid sum of
 “ — of principal, &c. [*as above*], assignation made of
 “ the same, and all action, pursuit, and execution whatsom-
 “ ever competent, or that might be competent to him in the
 “ premisses ; and turned and transferred the hail right,
 “ from him and his foresaids, to and in favour of the said
 “ *M* and his foresaids, whom he thereby surrogates and
 “ substitutes in his full right, vice, and place, &c.”

(*a*) If the parties are not personally apprehended, the intimation must be made at their dwelling-places, and the instrument must bear, that the Notary left a schedule for them at their respective dwelling-houses, because he could not apprehend them personally ; for it is a general rule in all instruments, That where parties cannot be got personally, schedules ought to be left at their dwelling-houses.

that they both might be liable in payment of the sums of money above assigned, and that they might not pretend ignorance of the said assignation, or intimation thereof, above written. And thereupon, and upon all and sundry the premisses, &c. These things were done within the dwelling-houses of the said C and D, *respective et successive*, betwixt the hours of, &c.

Besides intimations made on the transmission of moveable subjects, there are several other cases wherein intimations are made use of. For instruments under the hand of a Notary are sometimes necessary in bills of suspension, especially when these bills are to pass upon juratory caution: for by act of sederunt, 8th November 1682, the Lords ordain, “ That
 “ with bills of suspension on juratory caution
 “ an instrument be given in, bearing the day
 “ whereon he was to present the bill; and
 “ that he intimate the same to the charger,
 “ personally, or at his dwelling-house, if
 “ within the kingdom. And the said bill is
 “ to be given in within six days after the said
 “ day, or another intimation to be made;
 “ and that the ordinary, before reporting the
 “ bill, in time of session, or three Lords in
 “ time of vacance, cause publicly call the
 “ charger before the passing of the bill, &c.”

But no person incarcerated can be liberate by suspension, but upon sufficient caution: for the said act of sederunt enjoins, “ That

“ no

“ no charge to set at liberty be granted on
“ juratory caution.”

*Instrument of intimation that a bill of suspension is
to be offered on juratory caution.*

AT, &c. compeared *A*, as procurator for
B ; who, with us, passed to the personal
presence of *C* ; and, as the Lords of Council
and Session have by an act of sederunt ordain-
ed, made to him due and lawful intimation,
That the said *B* was, upon the — day of
— instant, to present to the said Lords a
bill for a suspension, upon juratory caution, of
a charge given to him for payment-making to
the said *C*, of the sum of —, [*as in the copy
of the charge*] ; and protested, That he might
not pretend ignorance thereof. Whereupon
the said *A*, as procurator foresaid, took instru-
ments in the hands of me Notary-public.
These things were done, &c.

Sifts upon bills of suspension, or passed bills
of suspension, are intimate to the charger or
his doer ; and unless that the suspender re-
quire a formal instrument, the Notary gene-
rally marks upon the bill thus : “ Edinburgh,
“ 10th November 1739, intimate this bill,
“ and deliverance thereon, to the within *C*,
“ charger, personally, [*or, to D his doer, per-
“ sonally*] ; *A* being procurator, *K* and *H*
“ witnesses ;” and the Notary signs his name.

But

But a formal instrument will be to this effect.

AT, &c. The which day, *A*, as procurator for, and in name and behalf of *B*, passed with me Notary-public, and witnesses subscribing, to the personal presence of *C*, charger, [*or, D* his agent and doer]; having, &c. (*a*) a principal bill of suspension, given in and presented to the Lords of Council and Session, at the instance of the said *B*; beseeching their Lordships, for the reasons therein set forth, to suspend a charge given to him by the said *C*, for making payment of the sum of — of principal —, of penalty, and of the bygone annualrents of the said principal sum, contained in a bond granted by the said *B* to the said *C*, dated —, registrate —; and upon which bill of suspension the following deliverance is wrote: *Apud Edinburgum, vigesimo die*
“Julii, millesimo septingentesimo trigesimo nono.
“To see and answer against Thursday next,
“and sists execution until Tuesday thereafter
“inclusive. Sic subscribitur H. D.” Which bill of suspension, and sist above narrated, the said *A* delivered to me Notary public, to be publicly read over and intimate: and which being accordingly done to the said *C*, personally present, the said *A*, procurator foresaid, protested, the said *C* might not pretend igno-

(*a*) “The within bill of suspension, and sist thereupon
 “within written, which he delivered to me Notary-public,
 “&c.” when the instrument is on the back of the bill.

rance

rance of the said bill of suspension, and siff thereon ; and thereupon took instruments in the hands of me Notary-public. These things were done, &c. (a).

When any prisoner applies to the magistrates of a burgh for the benefit of the act of parliament 1696, made in favour of insolvent debtors, *1mo*, The creditor at whose instance he was incarcerate, and those that shall arrest him in prison, are first cited personally by an officer of court, or by letters of supplement if living without the bailies jurisdiction ; or, if intimation be made to the creditors by a Notary and witnesses under form of instrument, that the prisoner is to apply for an aliment, and the benefit of the foresaid act, the same is sustained as a citation. *2do*, The prisoner then presents to the bailies the said execution of warning, or instrument of intimation, with a petition craving the benefit of the foresaid act ; to which is subjoined a declaration, subscribed by the clerk of the tolbooth, testifying at whose instance the debtor is incarcerate or arrested, and for what sums : and at calling thereof in court, if any compearance be made for the creditors, they are allowed to see and object ; and if no objection be proponed, then the prisoner is sent forth of prison ; and upon his deponing, that

(a) A passed bill of suspension may be intimate the same way, *mutatis mutandis*.

he has no means of his own wherewith to aliment himself in prison, the bailies modify an aliment to him, not under three shillings Scots *per diem* : which modification must be intimate to the creditor, requiring him, either to aliment the prisoner at the foresaid modification, or to consent to his liberation forth of prison, within ten days after the date of the said intimation made by a Notary and witnesses as effeirs. Then, after the ten days are freely elapsed, the prisoner produces another declaration, under the hand of the clerk of the tolbooth, testifying that he is neither alimented by his creditor, nor arrested at any other person's instance ; and thereupon grants a disposition *omnium bonorum* in favour of his creditors : and then, and no otherwise, the bailies grant the prisoner the benefit of the foresaid act of parliament.

Instrument of intimation by a prisoner to his creditors, that he is to apply for the benefit of the act of parliament 1696.

AT —, &c. compeared *A*, as procurator for, and in name and behalf of *B*, present prisoner in the tolbooth of —, and passed with me, and the witnesses subscribing, to the personal presence of *C*, *D*, and *E*, &c. And then the said *A* represented, That the said *B* lay incarcerated in the tolbooth of —, in virtue of an act of warding following upon a
registrate

registrar protest at the instance of the said C; and that he was neither able to pay the sum for which he lay incarcerate, nor aliment himself in prison; and that he was to apply for the benefit of the act of parliament in favour of insolvent debtors: therefore the said A, procurator foresaid, made due and lawful intimation to the said C, creditor incarcerator, and the haill other persons above named, also creditors to the said B, to compear before the bailies of —, in their ordinary court-place, upon the — day of —, at — of the clock in the forenoon, to hear and see the said B depone, in terms of the said act of parliament. Thir things were so done, in the personal presence of the said haill forenamed persons creditors, places, dates, and year of God *respective* before mentioned, in presence of — and — witnesses specially called and required to the premisses.

Instrument of intimation of the modification of an aliment of a poor prisoner to his incarcerator.

AT, &c. compeared A, as procurator for B, present prisoner in the tolbooth of —; and passed to the personal presence of C, at whose instance the said B is incarcerate: and the said A, as procurator foresaid, made due and lawful intimation to the said C, That upon presenting of a petition to the magistrates of the burgh of —, by B,

B, setting forth, That he was incarcerated in their tolbooth at the instance of the said *C*, and that he was not able to aliment or maintain himself in prison; and therefore craving they would take his oath anent his insufficiency to aliment himself in prison, and modify him an aliment in the terms of the 32d *act* of 6th *sess.* of K. William's 1st *parl.* the said magistrates had, upon the — day of — instant, taken the said *B* his oath, that he was not able to aliment himself in prison; and that they having also considered the said petition, deposition of the said *B*, with the assignation made by him in favour of the said *C*, they allowed and modified to him the sum of — of aliment *per diem*: and therefore the said *A*, as procurator foresaid, did intimate the foresaid petition, deposition, and deliverance on the said petition, modifying the foresaid aliment to the said *B*, and protested, That he should provide, or give security for the said sum, to be paid to the said *B* *per diem*, during his imprisonment, within ten days next after the said intimation; with certification, if he fail so do, that the said magistrates will liberate the said *B* out of their prison, in terms of the foresaid act of parliament. Which petition, deposition, and deliverance foresaid, the said *A*, as procurator foresaid, produced and shewed to the said *C*, and took instruments on the premisses in the hands of me Notary-public. These things were done, &c.

S E C T. III.

Of instruments of protestation and others relating to matters of commerce and business.

THese instruments are of various kinds, and differ as the circumstances of the case vary : and as they cannot be circumscribed, I have here set down such as most commonly occur ; and from them the Notary may be enabled to frame such other instruments as may happen to come in his way, whatever the case may be. The instruments here given, are,

- Instrument of protestation of bills,
- a shipmaster against the freighter.
- against wind and weather.
- the buyer of victual against the seller.
- a master against his apprentice.
- upon a bond of presentation.
- upon forcing payment of a controverted debt.
- requiring an act to depone.
- upon deforcement of a messenger.

I. As to the *first*, My Lord Stair, in his *Institutes*, p. 104. informs us, That the ordinary way of *mutuum* amongst merchants, is by bills of exchange, or letters of credit ; which have several specialties that arise from the

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nature

nature of these acts, and from custom, especially those common customs of merchants observed in cities of greatest trade in the neighbouring nations. The nature and tenor of these bills of exchange is, That the drawer of the bill orders such a merchant, his correspondent, to pay the sum contained in the bill, upon sight, or at such a certain time, or at such usance, and that for value received; wherein there is implied a mandate to the correspondent, and an obligation upon the drawer of the bill to make that mandate effectual; wherein *mutuum* is implied. If the value received by him be numerate money, or for any other cause, such as delivery of ware; and there is in it *fiat brevis manus*, as if the ware was sold to the drawer of the bill, and the sum in the bill was the price received, and delivered again in loan. There useth, in case of miscarriage, two or three bills to be drawn for the same sum, which do bear to be the *first*, *second*, and *third* bill, and the payment of any one satisfies all. The fixed form by custom of making use of these bills, is by presenting them to him upon whom they are drawn; and if he accept the bill, he writes thereupon *Accepts*, and signs it: which if it be simple, he becomes liable in the terms, and at the time mentioned in the bill. But sometimes the acceptor doth qualify his acceptance; which the creditor by the bill may refuse, and require either simple acceptance, or may protest for non-acceptance. But if he
suffer

suffer the acceptance to be qualified, it imports his consent, and he cannot protest for non-acceptance; as if the acceptance be to a longer day than that which is contained in the bill; or if it bear acceptance *if provisions come betwixt and the day, or if ware or bills in hand do raise the sum.* At, or after the day, the bill is again presented; and if payment be not then made, the creditor in the bill protests for not-payment; and both these protestations must be by instrument of a Notary, either for non-acceptance or not-payment; which instruments, with the bill, make sufficient probation, both against the drawer of the bill, and against him upon whom it was drawn; and neither witnesses nor the oath of the party will be sufficient to supply the protest: so that the instrument or protest is not only a proof, but a solemnity requisite. These protests may be taken against him upon whom they were drawn, either personally or at his dwelling-house; which was sustained, though, before presenting of the bill, the party upon whom it was drawn was dead, 8th July 1664, *Kennedy contra Hutchison.*

Protesting in general is a profitable remedy, whereby we commonly preserve our right entire; and in bills of exchange it is an essential piece of diligence, that cannot be dispensed with, or supplied by witnesses or oath of party, or by any other act. Bills are either protested for non-acceptance, or for not-payment, or the like. The design whereof is only to

signify to the drawer, that the possessor of the bill did his duty in duly requiring acceptance or payment; but that the person drawn upon was either unwilling, or not to be found, or insolvent; and thereby to make the drawer liable: for there is always action competent to the creditor in the bill against the acceptor, whether it be protested or not, though without that formality he cannot have summary diligence.

The form of protesting bills, varies in different places. In France, it must be done by two Notaries, or one Notary and two witnesses, or by a macer or serjeant with two witnesses. At Venice, bills are protested only by the servants of the college of commerce, and then entered in a particular register, patent to all merchants. In fairs, or markets, a Notary, or some other authorised person, does the business of protesting, and registering these protests. In England, the person to whom the bill is payable, his servant, agent, or assignee, causeth it to be protested by a Notary-public; and, in default of such Notary, by any other substantial person of the place, in the presence of two or more witnesses, betwixt sun and sun, or sun rising and setting, when shops are generally open, or the courts of justice sitting. But, with us, all protests are only made by taking instruments in the hands of a common Notary against the party, either personally, or at his dwelling-house, or lodging where he lives, or where he died;

died ; unless a bill is to be protested for not-payment ; in which case it sufficeth to protest at the place of payment mentioned in the bill, though the acceptor reside not there.

In all instruments of protest, the bill protested must be prefixed, with all the indorsements, if there be any, copied and transcribed *verbatim* ; and an account of the reasons given by the party, why he does not honour the bill, is ordinarily inserted in the protest.

If the bill be drawn on an unknown person, designed for example *merchant in Edinburgh*, who cannot be found, or got notice of, either at the exchange or post-office, or if indeed there be no such man, the bill must be protested in common form at the market-cross, and the instrument should bear how diligent the possessor was to find him out ; and if the possessor know not which of two persons of the same name it is directed to, and they both refuse acceptance, his best will be to protest against both : as when he knows not which of two accepted his bill, and both deny, it must be protested against both. For a further illustration of this subject, see Forbes on bills of exchange, *chap. 6.*

The same method nearly is used in inland bills, as in bills of exchange ; and the protests of both must be registered within six months after the term of payment, before any execution can follow on them in this country.

Instrument of Protest.

AT, &c. The which day, compeared the said *A*, merchant in —, to whom the principal bill above copied is drawn payable; and passed with me Notary-public, and the witnesses after named, to the personal presence of *B* (*a*), and there required acceptance of the foresaid bill; which request and desire not being complied with, the said *A* protested the foresaid bill for not acceptance against the said *B*, and for recourse against the drawer, [exchange, re-exchange, *if it be a bill of exchange*], cost, skaith, damages, interest, and expenses, as accords; and thereupon took instruments in my hands, in presence of, &c.

II. When shipmasters let out and freight their ships to merchants, for transporting merchandise to ports beyond seas, or coastwise from one port to another, they are bound to lie and remain a certain number of work-

(*a*) Or, if he cannot be personally apprehended, “to the dwelling-house of the said *B*.” If you are to protest for not payment, here insert the place of payment mentioned in the bill; if it have no place specified, it must be protested against the acceptor, either personally, or at his dwelling-house, or the market-cross of the burgh where he resides. Then say, “and required payment of the said bill; and in regard none compeared for that effect, therefore protested the said bill for not payment, [exchange, re-exchange, *if a bill of exchange*], cost, skaith, &c.”

weather

weather lie-days at the loading-port, for taking in the freighters goods and merchandise, and the agreed number of the said days at the unloading-port, for livering the outward cargo, and loading and taking in the inward: and if the merchants have not their goods ready to be put on board, and thereby detain the ship and crew beyond the agreed time, the master protests against the freighters for demurrage, and that they be liable to him for the sums of money stipulate by the charter-party, to be paid for each day he shall be detained over the lie-days agreed upon, and takes instruments in the hands of a Notary thereupon, as follows.

Instrument by the master of a ship against the freighters, for the penalty stipulate by the charter-party.

AT and within the port and harbour of —, aboard the good ship called —, of which *A*, shipmaster in —, is present master, the — day of —, one thousand seven hundred and thirty-nine years, and of his Majesty's reign the thirteenth year. The which day, in presence of me Notary-public, and witnesses subscribing, compeared personally the said *A*, shipmaster aforesaid; having an charter-party, of the date the — day of — last bypast, betwixt the said *A*, and *B* merchant in —; by which charter-party,
exhibited

exhibited and delivered to me the said Notary-public by the said shipmaster, the said *A*, for the sums of money, and other prestations therein and after mentioned, did set and to freight let the said ship called the —, of the burden of — tuns or thereby, to the said *B*, and bound and obliged him, his heirs, and others therein mentioned, to have his said ship in readiness, in good order, and sufficient condition, wind and water tight, with float-boat, cables, anchors, masts, sails, tows, oars, and all other necessary apparelling, with a crew of skilful and able-bodied seamen, and victuals sufficient for plying the voyage under written, and that within the said port and harbour of —, betwixt and the — day of — then next, and now last bypast, and there to remain for the space of — work-weather lie-days, and in that time to receive and take on board the said ship her full loading of corns, or such other goods as the said *B*, or any others in his name, should put on board; and immediately after the said ship should be fully load, (wind and weather serving), to sail from the said port and harbour of —, and to transport the cargo aforesaid directly to the port and harbour of — in —, and there to lie the space of — work-weather lie-days, for unloading the said outward cargo, and receiving and taking in a loading of —, and thereafter to sail with his said ship from the said port and harbour of —, and transport the said inward cargo directly for the
port

port and harbour of —, and there to lie and remain for the space of — work-weather lie-days, for livering and unloading the said inward cargo; and the said *A* bound and obliged him, his heirs and successors, that he should do his utmost and exactest diligence in sailing and transporting his said ship and cargo, and in loading and unloading the same, at the several ports above written; and that he should not suffer any part thereof to be spoiled, damnified, embezzled, or otherwise away taken, by himself or crew, or by and through any defect of his ship, or by and through the fault, neglect, or negligence of himself, or his sailors and crew; and to load and unload the outward and inward cargoes above mentioned, and to deliver the same to the said *B*, or any having his order and commission, at the several ports above expressed, within the space of — days after the arrival of the ship, in good order and condition, sea-hazard excepted allennarly: for the which causes, the said *B* bound and obliged him, his heirs, executors, and successors, to make good and thankful payment to the said *A*, his heirs, executors, or assignees, of the sum of —, in part payment of his freight, within the space of — days after unloading of the said cargo of —, at the said port and harbour of —; and further, to make payment to the said *A* and his foresaids, of the sum of —, in full and complete payment of freight for outward and inward cargoes, and that
within

within ——— days after the arrival of the said ship with the inward cargo of ——— at the said port and harbour of ———, but longer delay, with the sum of ——— money foresaid of liquidate expenses for each term's failzie, and annualrent of the said haill freight from the respective terms of payment above written until payment of the same; and further, to pay to the said *A*, the sum of ———, in name of caplagan, with pewage, rowage, and petty pilotage, and all other port-duties, conform to the custom of the sea: attour, the said *B* bound and obliged him and his foresaids, to pay to the said *A* and his foresaids, the sum of ——— money foresaid for each day he should be detained through his default, at the respective ports above written, attour the lie-days above expressed: and both the said parties bound and obliged them and their foresaids, to observe, fulfil, and implement their several parts of the premisses *hinc inde* to others, and the party-failzier to pay to the party observer, or willing to observe his part thereof, the sum of ———, by and attour performance; as the said charter-party, of the date foresaid, more fully bears. After public reading of which charter-party, in presence of the witnesses after named, the said *A* held forth and represented, That, in terms and implement of the charter-party above recited, he, with his ship and crew, did arrive in the said port and harbour of ———, upon the ——— day of ——— current, which he notified to the said *B*, [*or C* his factor];

tor]; and that he was ready to receive and take on board the said loading of —; but the said loading not being put on board, albeit the lie-days above mentioned be run out, therefore the said *A* protested against the said *B* for breach of charter-party, and that he might not only be liable to him for the sum of — for each day he shall hereafter be detained, but also for the penalty above expressed, incurred by him through failzie, and of all other cost, skaith, damage, and expenses, he, his ship, or crew, shall happen to sustain by and through his being detained longer than the lie-days above specified. Whereupon, and all and sundry the premisses, the said *A* asked and took instruments in the hands of me the said Notary-public subscribing. These things were done betwixt the hours of — and — before [or after] noon, place, day, month, year of God, and of his Majesty's reign, *respective* above written, before and in presence of *D, E, F,* and *G,* witnesses to the haill premisses specially called and required, &c.

III. Masters of ships do not only protest sometimes against their freighters, but likewise against wind and weather. For if a violent storm shall happen to a ship and crew when at-sea, and the master and seamen, for saving the ship, their own lives, and a part of the cargo, throw overboard some of the goods, then the master usually protests against the storm, wind and weather, at the main-mast;

maſt; as alſo, if a ſtorm happen, and the water thereby get into the hold, or damnify the goods, the maſter, in like manner, proteſts at the main-maſt againſt the ſtorm, wind, and weather, and takes ſome of the crew witneſſes: and, in either of theſe caſes, as ſoon as he comes to any port or ſtation, he comes aſhore, and brings his witneſſes along with him before ſome magiſtrate or juſtice of the peace, and a Notary-public, and cauſes the witneſſes depone upon the fact; and the deponing witneſſes, together with the judge, do ſign this inſtrument alongſt with the Notary and his witneſſes.

Instrument againſt wind and weather.

AT —, &c. compeared *A*, maſter of the good ſhip called the —, and with us paſſed to the perſonal preſence of *B*, provost of the burgh of —, and one of his Maſteſty's juſtices of the peace within the ſhire [*or* county] of —, and there held forth and represented, That whereas the ſaid *A*, as maſter of the ſaid ſhip, had ſailed with her in good order and condition from the port of —, for the port of —, and in his paſſage, upon the — day of — laſt bypaſt, about the hour of —, in the latitude of — degrees and — minutes, there aroſe and happened a prodigious ſtorm of wind (*a*) and rain, which

(*a*) If the inſtrument be taken againſt wind and weather,

which continued for the space of —; and the ship being in imminent hazard; and several times near overſet, he the ſaid maſter, having adviſed with the mate and crew, found and concluded there was no way or means, in human probability, could be fallen upon to ſave the ſhip, mens lives, or cargo, but by lightening the ſhip, and throwing over ſome of the heavy goods; and accordingly he the ſaid maſter, mate, and crew were neceſſitate, to prevent ſhipwreck, to throw over the following goods, viz. [*Here the goods, and their ſeveral marks whereby they are diſtinguiſhed, are mentioned*]; whereupon, in preſence of the mate and crew, he proteſted at the main-maſt againſt the wind and ſtorm, and that it was the greateſt hazard and neceſſity made him

ther, when by reaſon of the ſtorm water beats into the hold, and damniſies the goods, ſay, “ blowing from north-eaſt “ to weſt and by north, which had driven the ſhip up- “ on the ſhore along the coaſt from — to —, had he “ not, for preſervation of the mens lives, ſhip, and cargo, “ carried as much ſail as the ſtorm of wind would poſſibly “ allow, to clear the leeward ſhore, and get into an har- “ bour, which laid the ſhip ſo along, and the ſea making “ a paſſage over her, made him the ſaid maſter afraid of “ damage in the hold; whereupon, in preſence of the mate “ and crew, he proteſted at the main-maſt againſt the ſea “ and ſtorm of wind aforeſaid, about — of the clock “ that afternoon: after which he with no ſmall difficulty “ got into the harbour of —, where ſhe now lies: and “ the ſaid A, ſhipmaſter aforeſaid, for verifying what was “ above repreſented, adduced and preſented, &c.” as in the above inſtrument.

lighten the ship, and throw over the goods above mentioned, and that therefore he and his crew might be free of the damage and loss therethrough sustained, in regard it could neither be imputed to any defect or fault in the ship or mariners, but allenarly to the storm: and, for verifying what was above represented, adduced and presented *C*, *D*, and *E*, three of the mariners then on board the ship with him, and desired and craved that the said *B* might call the witnesses by their names, and take their oaths and depositions upon the facts above represented. And the said *B* having accordingly called the said *C*, *D*, and *E* severally, and they being all solemnly sworn and examined anent the facts above represented, they deponed, That the facts above related by the said *A*, shipmaster aforesaid, were real, just, and true, and that was the truth as they should answer to God. Whereupon (*a*) the said *A* of new again protested against the said storm, and that he and his crew might be free of the damage and loss of the goods thrown overboard, as said is, in regard the

(*a*) If it be against the storm when water beats into the hold, and damnifies the goods, say, “ the said *A* of new
 “ again protested against the storm and wind, and that if a-
 “ ny damage has happened by water getting into the hold,
 “ he and his crew might be free thereof, the same not be-
 “ ing occasioned by any insufficiency of the ship, or fault or
 “ neglect of the master and crew, but merely by the vio-
 “ lence of the storm; and thereupon took instruments,
 “ &c.” as above.

lightening

lightening of the ship, by throwing over the same, was absolutely necessary for preventing shipwreck, and saving the mens lives and remainder of the cargo; and thereupon took instruments in the hands of me Notary-public subscribing. These things were done, &c.

IV. When an heritor sells any quantity of victual, there is a contract signed by him and the buyer, by which the heritor stands bound to deliver the quantity sold, by a certain day, at the port or certain place agreed upon, to the buyer, or any having his order, and to pay a sum agreed upon for each undelivered boll; and, on the other hand, the buyer becomes bound to pay the price at the time agreed upon, with annualrent after the term of payment, and that under a penalty: and if the seller fail to deliver all or any part of the victual at the time limited, then the buyer protests against him for the penalty due for each undelivered boll, and all other damages; as in the following specimen.

Instrument the buyer of victual against the seller.

AT the burgh of —, &c. compeared personally *A* (*a*), and with us passed to the

(*a*) Or, “*C*, as procurator for, and having power and commission from *A*, to receive the quantity of victual after mentioned.”

pier of the said burgh of — (a), where the quantity of victual under written was deliverable in manner after specified; having, &c. a contract of victual, of the date the — day of — last bypast, made, passed, and perfected betwixt the said *A* and *B* on the one and other parts; whereby the said *B* (for the causes therein specified) sold and disposed to the said *A*, his heirs, executors, or assignees, all and haill the number and quantity of — bolls well-dight bear, and — bolls good and sufficient oat-meal, merchant-stuff and market-ware, of the growth of the lands of —, crop and year of God —; which number and quantity of — bolls of bear, and — bolls of meal, of the quality, growth, and crop foresaid, the said *B* bound and obliged him, his heirs, executors, and successors, to deliver to the said *A* and his foresaids, or any person having his or their order and commission, upon the pier of the said burgh of — (b), betwixt the — and — days of — then next, now current; and that as follows, *viz.* The bear, with the met and measure of the said burgh, and the meal at eight stone weight *per* boll; and the said *B*, in case of not delivery of the victual above written, within the time limited, thereby bound and obliged him and his foresaids,

(a) Or, "the granaries and barns of *B*."

(b) Or, "within the granaries and barns of the "said *B*."

to pay to the said *A* and his foresaids, the sum of — Scots money for each undelivered boll of the said bear, and — money foresaid for each undelivered boll of the meal above mentioned; as the said contract, of the date foresaid, more fully bears. After public reading of which contract above written, by me the said Notary public, in presence of the witnesses after named, the said *A* (*a*) represented, That, notwithstanding of the contract above mentioned, and that he had given notice to the said *B*, that he was ready, willing, and attending, to receive from him the quantity of victual above mentioned, and that this was the last day of the time limited; yet nevertheless that the said *B* had failed to deliver the hail quantity above mentioned [*or* — bolls bear, and — bolls meal]. And therefore the said *A* (*b*) protested against the said *B* for breach of contract, and that he might be liable for the said sum of — for each undelivered boll of the bear, and — money foresaid for each undelivered boll of the meal above mentioned, and for the penalty of the contract, and for all other cost, skaith, and damage, suffered or to be suffered through the said *B* his not implementing the said contract; and thereupon took instruments, &c. These things were done upon the pier of the

(*a*) Or, "*C*, as procurator, and in name foresaid."

(*b*) Or, "*C*, as procurator foresaid."

faid burgh (a), betwixt the hours of ——— and ——— before [or after] noon, place, day, &c.

V. Instruments are likewise taken by masters against their apprentices and their cautioners, for the breach of one or other of the parts of the indenture, and for the penalty, and other damages the master may sustain by the said failure.

Instrument a master against his apprentice, for breach of indenture.

AT, &c. compeared personally *A*, within his own dwelling-house in ———, having, &c. letters of indenture, made and passed betwixt him on the one part, and *B*, lawful son to *C* of ———, with consent of the said *C* his said father, and the said *C*, as burden-taker and cautioner for his said son, on the other part, dated at ———, the ——— day of ——— years; whereby (for the causes therein specified) the said *B* became apprentice and servant to the said *A* in his art, calling, and employment of ———, for all the days, space, and years of ———, full and complete years, next and immediately following after his entry, which is thereby declared to have been and begun,

(a) Or, “ within the granaries or barns of the said “ *B*.”

Ec. [*Here take in the obligatory part of the indenture upon the apprentice and cautioner, then say*], as the said indentures more fully reports: which indentures above written the said *A* did exhibit, present, and deliver to me the said Notary-public, to be openly read in presence of the witnesses under written; and which accordingly I did. After reading and publishing whereof, the said *A* did represent, in presence of me and the said witnesses, That the said *B* had most wilfully failzied and contravened all his parts and prestations of the said indentures, in so far as [*Here insert the particular breaches, and then say*], And therefore the said *A* protested, That the said *B*, and *C* his father and cautioner above written, may not only be liable to him in the apprenticeship, and liquidate penalty contained in the said indentures, but also for all cost, skaith, damage, and expenses he may any wise sustain or incur through the said *B* his breaking his indentures, in manner particularly above expressed. Whereupon, *Ec.*

VI. If a messenger shall, by virtue of letters of caption, apprehend a debtor, and thereafter give him some time to pay the debt, upon some responsal person's granting bond to present him at a fixed day, or otherwise to pay the debt; and if at the fixed day the debtor compear not, then the messenger protests the bond against him and his cautioner; and thereupon the cautioner becomes bound

bound and liable for the debt, and may be forced to pay by letters of horning upon the bond of presentation and instrument.

Instrument upon a bond of presentation.

AT —, &c. compeared personally *A*, messenger, to whom the bond of presentation after mentioned is made and granted, and with us passed to the house of *B*, the place of presentation under written, having, &c. (*a*) a bond of presentation made and granted by *C* as principal, and for and with him *D* as cautioner, sovrerty, and full debtor for him, of the date the — day of — years; whereby (for the causes therein specified) the said *C* and *D*, principal and cautioner foresaid, band and obliged them, conjunctly and severally, their heirs, executors, and successors, either to enter and present the said *C* prisoner to the said *A* messenger, or any other messenger having the letters of caption therein contained, and that within the dwelling-house of the said *B*, within the burgh of —, upon this day, betwixt the hours of — and — upon the town-clock of the said burgh, the afternoon of the said day; and that without

(*a*) “ The bond of presentation within written; which
 “ bond he delivered to me Notary-public, to be read and
 “ published to the witnesses present; which I did: and af-
 “ ter reading, &c.” if the instrument is on the back of the
 bond.

any

any expedite suspension, passed bill, or sist of execution, protection, or any other dilator, stop, or impediment whatsoever, which might any wise stop, hinder, or impede the putting to further execution, by incarceration or otherwise, the letters of caption therein mentioned, raised at the instance of *E*, against the said *C*, for not payment-making to him of the sum of — Scots money of principal, — of liquidate expenses, and certain bygone annualrents of the said principal sum resting unpaid, specified and contained in a bond and obligation made and granted by the said *C* to the said *E*, dated —, registrate in the books of —, the — day of —, and in the letters of horning and execution thereof following upon the same : or otherwise, in case they should happen to fail in all or in any part of the premisses, then and in that case they bound and obliged them, conjunctly and severally, and their foresaids, thankfully to content, pay, and deliver to the said *E*, his heirs, executors, or assignees, all and haill the foresaid sum of — money foresaid of principal, with the sum of — money foresaid of necessary expenses, expended by him in doing diligence upon the said bond, together with the sum of — money foresaid of bygone annualrents of the said principal sum resting at the date of the said bond of presentation ; extending, the said principal sum, bygone annualrents, and necessary expenses above mentioned, at the date foresaid, to the
sum

sum of —; and that betwixt and the term of — next to come, but longer delay; with the sum of — money foresaid of liquidate expenses in case of failzie; together also with the due and ordinary annualrent of the said haill principal sum, accumulate as said is, from the date of the said bond of presentation to the said term of payment, and yearly, termly, and proportionally, during the not payment of the same; as the said bond of presentation more fully bears. Which bond of presentation above narrated the said *A*, messenger foresaid, and as procurator for the said *E*, (whose power of procuratory was clearly known to, and understood by me the said Notary-public), exhibited, presented, and delivered to me the said Notary-public, to be openly read and published in presence of the witnesses under written; all which accordingly I did. After the reading and publishing of the said bond of presentation, and attending and waiting at the place above written till after the said hour of — in the afternoon upon the town-clock of the said burgh, the day foresaid, the said *A*, messenger, and procurator foresaid, in regard the said *C* and *D* had failzied to present the said *C*, this day, hour and place, in the terms and to the effect mentioned in the said bond of presentation, protested, That they may be liable, conjunctly and severally, to the said *E* and his foresaids, for payment of the said accumulate sum of —, annualrents thereof, and penalty

ty above written (if incurred), at the said term of ——— next to come. Whereupon, &c.

VII. When decreets are obtained against any person, in processs, where there is either no compearance made, or at least no effectual pleading for them; and yet, when they offer bills of suspension of the charge on such decreets, the same are sometimes refused; the debtor, in these cases, behoves either to pay or go to prison: and in these and the like cases, where people are compelled by force of diligence to pay debts they think not just or not due, there is no remedy but to pay under protestation, That it is not voluntary, but by force of diligence; and that the payment shall infer no homologation, but that it may be entire for the payer to reduce the decret, &c. charged on.

Instrument by a debtor against a creditor, forcing payment of a controverted debt.

AT —, &c. compeared personally *A*, and with us passed to the personal presence of *B*, and there represented and declared, That albeit the said *B* had obtained a decret and sentence at his instance against him, before the Lords of Council and Session, [*or sheriffs of —*], whereby he was, for the causes therein specified, decerned and ordained, &c. [*Here take in the decerniture of the decret, and then say*],

say], upon which decret the said *B* having raised horning, and by virtue thereof caused charge the said *A*, for eschewing the danger thereof, he offered a bill of suspension of the said charge before the Lord ———, Ordinary on the bills for the time, which his Lordship thought fit to refuse; yet nevertheless, and notwithstanding thereof, the said *A* declared, That he was convinced in his conscience that the said decret was unjust, and neither founded upon law nor justice, and that he was wrongously compelled to pay the sums therein contained by mere force of diligence, to shun imprisonment; and therefore he the said *A* protested, That his paying the sums contained in the said decret shall no wise be interpreted to be any homologation or approbation of the same, or of the diligence following thereupon; but that it may be leisome and lawful to him to quarrel and reduce the same upon any competent grounds in law, and to insist for, and recover repetition of the said sum, wrongously extorted from him *vi et metu carceris*, in manner above mentioned, as accords of the law. Whereupon, &c.

VIII. A party in a process, to whose oath an allegation or other point in dispute is referred, is sometimes obliged to protest against the other party to furnish him an act for his deponing, in terms of the *act* 10. *parl.* 1686; which is done in manner following.

Instrument

Instrument requiring an act to depone in a process.

AT, &c. compeared *A*, and passed with me Notary-public, &c. to the personal presence of *B*, advocate and procurator [or agent and doer] for *C*; and desired and required the said *B*, conform to the 10th act, *parl.* 1. *sess.* 2. *Ja.* VII. to furnish him the said *A* with an act to depone in the cause pursued at the instance of the said *C* against him, the libel being referred to his oath, and the — day of — assigned to him for that effect; which the said *B* refused to do; wherefore the said *A* protested, That he might be dismissed and liberate from deponing therein, in respect he had made the foresaid requisition before any circumduction, and after the term assigned him to compear, in order to depone in the process, was elapsed. Whereupon, &c.

IX. Messengers have sometimes occasion to take instruments in the hands of a Notary upon deforcement in the execution of their office, and to protest, That the resisters and deforcers may be liable in the pains of law; especially in poindings, where he has the opportunity of a Notary; but in captions, when this opportunity cannot so well be had, his breaking his wand of peace in presence of his concurrences, and his own execution thereon, is sufficient.

Instrument of deforcement.

AT, &c. compeared *A*, messenger, and passed with us, at command of letters of horning and poinding after mentioned, to the dwelling-house of *B*, and to the ground of the lands of —, where there were several poindable goods and gear belonging to him; having in his hands the said letters of horning and poinding, dated —, and signet —, at the instance of *C*, against the said *B*, and execution of charge to make payment of the sum of — of principal, and annualrent thereof resting unpaid and in time coming, contained in the said letters, (the days whereof were long expired); and there, with his blazon displayed upon his breast, after exhibiting and reading the said letters of horning and poinding, and charge to make payment, the said *A*, by virtue thereof, in his Majesty's name and authority apprehended, and was going about to poind the said goods and gear belonging to the said *B*; but he the said *B*, in a most furious manner, did attack and assault the said *A*, messenger foresaid, with his sword, staff, or other weapon, in the execution of his office, and beat, bruised, and wounded him, to the effusion of his blood: and therefore the said *A*, messenger foresaid, in regard he was forcibly resisted and deforced in the execution of his office, in manner foresaid, did break his wand of peace, and protested,

tested, That the said *B*, the deforcer, had incurred and might be liable in the pains and penalties of law provided and accustomed in the like cases. Whereupon, &c.

S E C T. IV.

Of instruments in desuetude.

THE following instruments are such as rarely occur in practice, or such as are entirely in desuetude; of which nevertheless it is thought proper to exhibit some specimens. Of the first sort are instruments of intimation of a gift of marriage, and that on going to kirk and market. Those entirely in disuse are instruments of institution and of appeal.

In the distribution of the lands of Scotland by King Malcolm Kenmore to his subjects, he reserved the ward and marriage of their heirs; whereby there was introduced a casualty due to the superior of ward-holdings, That if the vassal die, and he who succeeds him be unmarried, whether he be minor or major, the superior gets the avail of his marriage; by which is understood, the value of his tocher. Among the many reasons given for this casualty, my Lord Stair seems to incline to the following one: That by the nature of ward-holding, as it was when first introduced, being for military service, and being a gratuitous donation, that service was not as an e-

quivalent cause, seeing the occasions of the war were uncertain, but was as a grateful acknowledgment of the vassal; and therefore, when the vassal was not in capacity for service in war, the superior resumed his fee into his own hand, during the vassal's minority, and was not thereby obliged to aliment the heir; as appeareth by the *act* 25. *parl.* 1491, ordaining wardators, that is, all having right to the ward of a vassal's heir, whether superior, or donatar, or assignee, to give a reasonable living for sustentation of the heir, according to the quantity of the heritage, if the heir hath no blench or feu lands to sustain him on. So that before this act the heir had no aliment out of his fee during his minority; and by the act he had no aliment from the superior, if he had feu or blench lands to sustain himself: so that formerly the heirs of ward-vassals were reduced to extreme penury in their minority, if they had nothing else but their ward-fee. For remeid whereof, mutual burdens were introduced upon the ward-fee, *viz.* That the superior should aliment his minor vassal, and yet, in recompense thereof, he should have the avail of his tocher; but being obliged to aliment the heir, and not to aliment him and his family when he was married, therefore his tocher belonged to himself *ad sustinenda onera matrimonii*, till he came to majority, and might enter to his fee, and have the full profits thereof.

The avail of which tocher hath certainly
been

been of old the tocher the vassal got, wherein the superior had this just interest, that if his vassal should imprudently marry, getting too small a tocher, that therefore the superior might offer him a match with a better tocher; and if he refused it, and married the other, the avail should be esteemed as equivalent to the tocher he might have had; and that in consideration not only of his ward-fee, but of all other his estate, real and personal: which was very rational, and suitable to the time that the avail of marriage was introduced, when personal debts were very rare, and therefore the vassal might well pay the avail of his marriage when he came to his fee, without any excessive burden.

But since personal debts came to be so frequent, the avail of marriage is only in relation to the free estate, real or personal, of the vassal. And custom hath fixed the single avail about two years free rent of the vassal, wherein there is a latitude to the Lords, to modify according to their circumstances. And as to the double avail, it never exceeds three years free rent: and my Lord Stair adds, it is so little favourable, and hath so many solemnities, that he never observed, since the institution of the college of justice, the double avail to be found due, the method of obtaining it being so contrary to all the designs pretended for this casualty: for therein the superior, or his donatar, do never offer a match which he believes the vassal will

accept, but of design to get a double avail; wherein nothing appears of tutorial trust, or of that strict confidence between superiors and vassals, nor any thing to prevent marrying with an unfriendly family.

But the single avail is favourable, as a real burden upon the fee, and hath for recompense the aliment of the vassal's heir; and is a burden which the vassal may bear without hazard of ruin, or great distress, being oft-times within the value of the tocher the vassal gets, and never above what by prudent management he might get: so that though the vassal marry an heritrix of a great estate, and she dispoſe the same to her husband, yet he pays no more; as was found 14th June 1673, *Gibson contra Ramsay*. And there is no extension upon the consideration of his personal qualifications, by his birth, beauty, vigour, or reputation; but only in consideration of his estate; wherein the tocher is not accounted any part of his estate, because the avail comes in place of it.

That the burden of the avail of marriage may be easy, albeit a vassal have many wardfees holden of the same superior, or of different superiors, he is liable but for one avail; and that to the king, if he be one of his superiors; or otherwise to the eldest superior: but if the king acquire a superiority, by buying the same, it is *in privato patrimonio*, and therein *utilitur jure communi*, and doth not exclude an elder superior; and the superior to whom

whom the marriage is due, is only liable for maintenance of the heir; which is a further evidence of the true rise and design of this casualty.

There is no marriage due, if the vassal's heir-apparent was married in his predecessor's lifetime; which gave occasion to think, that the arise of this casualty was by the tutorial power of the superior, which being excluded by the lawful administration of the father, the superior could not claim his vassal's tocher for his neglect or contempt. But this is too narrow a ground: for though the vassal's predecessor be not his father nor grandfather, but a collateral, there is no tocher due. But the true cause is evident enough, That here the vassal's heir (while in ward) hath no tocher to expect, being married already, and ordinarily his tocher applied for his predecessor's debt; and therefore a superior cannot claim a tocher where the vassal can have none. Nor could he claim a tocher, if it were known that his vassal were impotent, and incapable of marriage.

The confidence betwixt superiors and vassals makes the feudal contract to be *uberri-
mæ fidei*, most exclusive of all rigour and fraud: and therefore, if a vassal shall by precipitation marry his apparent heir, when he is *moribundus*, without treaty or public proclamations, the heir is liable for a marriage, although he was married before his predecessor's death; as was found in the case of the Lord Colvil of Cleish, 20th February 1667: much more if the vassal marry his apparent
heir

heir before he attain to the marriageable age, which in males is esteemed fourteen complete, and in females twelve complete. And although all formalities were observed, yet it were justly to be accounted a fraudulent design to elude the avail of his marriage; or if the heir were of that vigour that he did marry himself, or his tutors did marry him before he were fourteen complete, the avail of his marriage would be due: or, if, during the ward, the heir should acquire a ward-estate holding of the King, it would not exclude his other superior, but would justly make him liable both to him and to the King, and might well be extended to two years rent to either superior: whereas other double avails upon requisition are never to be extended above three years free rent; for these are never without fraud, albeit they have been hitherto still excluded upon informalities.

The form of requisition made by the superior to his vassal to marry, is thus: The superior, or his donatar, or their assignees, by themselves or their lawful procurators, go to the heir personally, if he can be apprehended, or to his dwelling-place, and offers him a wife, expressly of the like degree and quality with himself, and with whom he may marry without disparagement; and requires the said heir to appoint a day, in such a kirk, for celebrating the marriage. If the heir refuse to appoint a day, the superior, or those who have right from him, may design the day,

day, providing there be thirty days free after the requisition; and that day the superior must promise to have the woman offered ready in the said kirk. If it be a donatar, or his assignee, who requires, he ought first to instruct his title to the heir, that he may know that he has right to require; and so must show his gift or assignation to him, and cause read over the same. When the day appointed for celebrating the marriage comes, he must bring her with him whom he offered, who must signify that same time that she is ready to fulfil what was promised in her name; and she must attend in the church till one o'clock after noon, that all action of subterfuge may be taken away; but longer attendance is not requisite.

If the heir of the vassal required, compares not, or, compearing, refuses to marry the woman offered; the superior, or he who has right from him, takes instruments upon these things which were done and said, and protests for the single and double avail of the marriage. Nothing is admitted to be proven by witnesses, but by the solemnity of the instrument of a Notary before witnesses.

*Instrument of intimation of a gift of marriage,
and offer of a person agreeable.*

IN Dei nomine, Amen, &c. compeared personally *A*, as procurator for, and in name and

and behalf of *B*, in whose favour the gift of the marriage after expressed is given and granted, and in name and behalf of *C* his lawful daughter, whose procuratory was sufficiently known to me Notary-public in manner after rehearsed; and passed to the personal presence of *D*, having and holding in his hands a certain gift and disposition, made and granted to the said *B*, by *E*, superior of the said *D* his lands of —, and others therein specified, of the marriage of the said *D*, and all profits and commodities thereto pertaining, dated —, together with a procuratory granted by the said *B* and *C* to the said *A*, to the effect after mentioned, dated —; and there, after public reading of the said gift and procuratory in presence of the said *D*, and delivering him an attested authentic double of the said gift under my sign and subscription-manual, which was left with the said *D*, the said *A*, as procurator foresaid, made due and lawful intimation to him of the foresaid gift of his marriage, and also offered the said *C* to him in marriage, as a person agreeable, without disgrace or disparagement, and required and desired him to take her in marriage, and to solemnize the same *in facie ecclesiæ*, with all solemnities usual; and, for the better effectuating thereof, assigned and appointed the — day of — next, betwixt the rising and setting of the sun, for an interview and conference to be had thereupon, betwixt the said *D* and *C*, within the
Old

Old kirk of Edinburgh, at that place thereof where the Earl of Murray's tomb is situated, as an indifferent, safe, and convenient place for both parties to meet and treat as effects, and thereupon to make, grant, and subscribe sufficient contracts-matrimonial, containing all clauses requisite, with a sufficient jointure therein, to the value of the third of the said *D* his rents, to be provided to the said *C* as party agreeable aforesaid; otherwise desired the said *D* himself would nominate and appoint some special time and place, lawful and convenient, to the effect aforesaid, which the said *A*, in name and behalf of the said *C* and *B*, promised to keep and observe for their parts: and in respect the said *D* made no answer, either of promise to observe and keep the said day and place, or nomination of any other, neither refused the samen offer made aforesaid, therefore the said *A*, procurator aforesaid, protested solemnly, That the samen might be holden as a refusal, and protested for the single and double avail of the said *D* his marriage, and profits thereof, to be paid to the said *B* as having right in manner aforesaid, as accords of the law. Upon whilk, &c.

II. We are informed by Stair and Mackenzie, that by ancient custom, time out of mind, and not by statute or written law, a man cannot dispoise his heritage upon death-bed in prejudice of his heirs. The reason of this custom may be conjectured, not only from

from the nature of feudal rights, not disposable by testaments, but only by investiture; but also for public utility: so jealous was our law of the importunity of churchmen and friends, and of the weakness of mankind under such distempers, the mind being easily affected with the trouble of the body, and so easy to be wrought upon by insinuations or importunities, to do deeds contrary to their interest and former resolutions. And therefore, if a man has made any right in prejudice of his heir after contracting sickness, though he was found in his judgment for the time, and continued so for a very long time thereafter; yet this right would be reduced, as done *in lēto*, or upon deathbed, either at the instance of the apparent heir, or at the instance of the apparent heir's creditors: and it is sufficient to prove, that he was sick incontinently before the disposition quarrelled, without proving that he died of that sickness, or was sick the very time of the disposition.

If thereafter the maker of such a right comes to kirk and market unsupported, the law presumes that the maker was reconvalesced, and so the deeds reconvalesce with him. But since the law has fixed on kirk and market, as open places where the disponent may be seen by all men, and by unsuspected witnesses; equivalent acts, as going to pay visits, though at a greater distance, will not be sustained. And this going to kirk and market must be when people are convened in
the

the kirk or kirk-yard, for some civil or ecclesiastic end, or when they gathered together in public market; otherwise picked out witnesses may be chosen to wait upon the party to the kirk and market-place, which in many cases will be very private, and will not expose the party to public view. For remeid whereof, the Lords of Session, by their act of federunt 29th February 1692, "taking to
 " their serious consideration, That the excel-
 " lent law of deathbed, securing mens inhe-
 " ritances from being alienated at that time,
 " may happen to be frustrate and evacuate,
 " if their coming to church or market be
 " not done in such a public and solemn man-
 " ner, as may give some evidence of their
 " reconvalescence without suppartation or
 " straining of nature; and seeing some may
 " think it sufficient, if parties, after sub-
 " scribing such dispositions, come to the
 " church at any time, and make a turn or
 " two therein, though there were no con-
 " gregation at the time; and likewise if they
 " make any merchandise privily in a shop or
 " crame, or come to the market-place when
 " there is no public market; and all this
 " performed before their own picked out wit-
 " nesses, brought along with the party in
 " whose favour the disposition is made; that
 " the state and condition of his health or
 " sickness may be also little under the view
 " and consideration of other indifferent per-
 " sons as can be; the occasion of which mis-

“ take might have been, that formerly there
 “ were public prayers, morning and evening,
 “ in the church, in many places, to which
 “ those who apprehended any controversy
 “ might arise upon the validity of their dis-
 “ positions, were accustomed to come at the
 “ time of prayer, and some thought they
 “ might come to the church, though there
 “ were no public meeting thereat, since these
 “ public prayers were not accustomed, and
 “ to take instruments upon their appearing
 “ thereat: for remeid whereof, the Lords
 “ declare, they will not sustain any such par-
 “ ty’s going to church and market, where it
 “ is proven that he was sick before his subscri-
 “ bing the disposition quarrelled as done *in*
 “ *leElo*, unless it be performed in the day-time,
 “ and when people are gathered together in
 “ the church or church-yard for any public
 “ meeting, civil or ecclesiastic, or when
 “ people are gathered together in the mar-
 “ ket-place for public market; and further
 “ declare, whensoever instruments are taken,
 “ for the end foresaid, that the said instru-
 “ ment do expressly bear, That it was taken
 “ in the audience and view of the people ga-
 “ thered together as aforesaid, otherwise the
 “ Lords will have no regard to the said in-
 “ strument.”

And further, the parliament 1696, for
 clearing questions arising concerning deeds
 upon deathbed, did, by *act* 4. statute, “ That
 “ it shall be a sufficient exception to exclude
 “ the

“ the reason of deathbed, as to all bonds,
“ dispositions, and other rights to be grant-
“ ed by any person after sickness, That he,
“ the granter, lived threescore days after ma-
“ king of these deeds, albeit during that
“ time he went not to kirk or market. And
“ this is without prejudice to reduce these
“ rights for this reason, That the person was
“ so affected by the sickness at the time of
“ granting them, that he was not of sound
“ judgment and understanding.” Neverthe-
less, in order to make the deed the more secure,
and in case the granter should not live out
the sixty days, if he goes to kirk and mar-
ket unsupported, and takes instruments there-
upon, at each of the said places, in the
hands of a Notary-public, in presence of fa-
mous witnesses, and in the audience and
view of the people gathered together, the
disposition or other writ will be valid.

*Instrument upon a person's going to kirk and
market.*

AT, &c. compeared personally *A*, granter
of the disposition after mentioned, and
passed with me and the said witnesses, unsup-
ported, helped, or assisted any manner of way,
to the — church of —, and there abode
and continued for above an hour and an half,
and heard —, minister of the said church,
preach, pray, and expound the scriptures;

and, after sermon was ended, and at the separation and dissolving of the congregation, did exhibit and present to us the said Notary-public and witnesses, in the presence and audience of many people standing by, a disposition made and granted by the said *A*, to and in favour of *B*, of the date the ——— day of ——— years; whereby (for the causes therein specified) the said *A* sold, annailized, and disposed, from him, his heirs, and all others his assignees, to and in favour of the said *B*, his heirs and assignees whatsoever, all and haill [*Here insert the lands*] lying within the parochin of ———, and sheriffdom of ———, together with all right, title, and interest, claim of right, property, and possession, petitor and possessor, which the said *A*, and his predecessors, cedents, and authors, heirs and successors, had, have, or any wise may have, claim, or pretend to the lands and others above disposed, or to any part or portion thereof, at any time bygone or to come: After exhibition, production, and inspection of the said disposition, in presence of me Notary-public and witnesses after mentioned, and in the presence and audience of many people standing by, the said *A* declared it was truly subscribed by him of the date the same bears. And sicklike, the said *A* did compear, upon the ——— day of ———, and year foresaid, in presence of me the said Notary public and witnesses after expressed, and with us passed, unsupported, helped, or assisted

assisted any manner of way, to the cloth market of —, standing in the — thereof; (market-time of day), when the people were fully convened; and there did buy some cloth and stockings, and thereafter did again produce and exhibit the disposition above written, and declared *ut supra* in our presence, and also in the presence and audience of a great many other people standing by. And upon ilk ane of the said — and — days of —, and year foresaid, the said *A* did return from the said church and market, *respective* and *successive*, unsupported, helped, or assisted any manner of way; and at ilk ane of the said kirk and maket, upon the respective days above expressed, the said *A* did protest, That, seeing he had come to the said places upon his own feet, without any help or support whatsoever, that, conform to the laws of this kingdom, and particularly the act of sederunt 1692, the said disposition was and might be holden and repete, in all time coming, an true, valid, and effectual deed. Whereupon, and all and sundry the premises, the said *A*, at ilk ane of the said kirk and market, upon the respective days above written, asked and took instruments, in the hands of me Notary-public subscribing, openly, at the separation of the said congregation, and in the face of the said public market, in the presence and audience of the said witnesses, and many other people convened at ilk ane of the said places for the time. These things were act-

ed and done, at the said church, in presence, view, and audience of the people convened for the time to hear divine service, upon the said — day of —, and year foresaid, betwixt the hours of — and — before noon; and at the said market, in view and audience of the people there convened, upon the said — day of —, and year of God above written, betwixt the hours of — and — also before noon, and that also before and in presence of the witnesses under written *respectively*, viz. at the said church, *B* and *C*, and at the said market, *D* and *E*, witnesses to the haill premisses specially called and required.

III. After the abolishing of Episcopacy, the moderator and members of the presbytery came in place of the bishop: and therefore, when a patron, upon the vacancy of a church, did present a person in terms of law to the presbytery, in order that they might try his qualifications; if they found him qualified, they admitted him to the benefice by their letters of collation; and in the end of these letters there was a precept, directed to some two or three of the presbytery, to go to the vacant church, and enter the person collated thereto, as also to the manse and glebe, and to the modified stipend, and tithes, parsonage and vicarage; upon which the intrant took instruments in the hands of a Notary. But now all this is transacted by way of act in the presbytery:

presbytery: nevertheless I thought it not amiss to insert this instrument.

Instrument of institution of a minister.

AT, &c. compeared personally a Reverend brother in Christ, Mr *A*, minister of the gospel at —, to whom the precept of institution contained in the letters of collation after specified is directed in manner after mentioned; together also with another Reverend brother in Christ, Mr *B*, in whose favour the said collation and precept of institution is granted; and passed with me the said Notary-public; and witnesses under written, accompanied with most of the heritors of the parish of —, to the parish-church thereof; and there the said Mr *A* prayed, preached, and made an excellent sermon, suitable to the occasion; and, after divine service was ended, he did exhibit and produce, in presence of us the said Notary-public and witnesses, and also in presence of the said heritors and congregation, convened at the time, letters of collation, containing the precept of institution under written, made and granted by a Reverend brother in Christ, Mr *C* minister of the gospel at —, moderator of the presbytery of —, and the remanent Reverend brethren and members of the said presbytery, in favour of the said Mr *B*, of the date —, and containing the precept of institution under

der written; mentioning, That forasmuch as an Noble and Potent Earl, *D* Earl of —, undoubted patron of the said parish of —, by his letters of presentation, of the date the — day of — years, for the causes therein specified, had nominated and presented the said Mr *B* to be minister of God's word within the said parish of —, and to the haill constant local and modified stipend, both parsonage and vicarge, of the said parish, and to the manse, glebe, yards, houses, biggings, and pertinents thereof, during all the days of his lifetime, now vacant, and in the hands, and at the disposal and presentation of the said Noble Earl, by the death [*or* transportation] of Mr *C*, late minister and incumbent thereof; and desired and required the said Reverend moderator, and remanent brethren and members of the said presbytery, to try and examine the qualifications, literature, and conversation of the said Mr *B*, and his abilities to discharge the office of a minister within the said church and parish of —, and, being qualified, to receive and admit him thereto: and accordingly the said Reverend moderator, and remanent brethren and members of the said presbytery, having examined and tried the qualifications, literature, and conversation of the said Mr *B*, conform to the acts of the general assembly of the kirk of Seotland, found him meet, able, and qualified, to use and discharge the office and function of a minister in the church of God, and therefore
admitted

admitted him as minister at the said kirk of —, and in and to all and hail the constant local modified stipend, both parsonage and vicarge, of the said kirk of —, and in and to the manse and glebe, with houses, biggings, yards, and hail parts, pendicles, and pertinents thereof, during his lifetime, and serving the cure at the said kirk, as said is; as the said letters of presentation, of the date foresaid, with the letters of collation, containing therein the precept of institution under written, at more length proports. Which letters of collation the said Mr A gave and delivered to me the said Notary-public, to be openly read and published, in presence of the said witnesses, heritors, and congregation, convened for the time; and all which accordingly I did. Of the which precept of institution, contained in the said letters of collation, the tenor follows: And to the effect the said Mr B may have institution in the foresaid kirk, and be put in the possession of the manse, glebe, office-houses, and pertinents thereto belonging, we the said moderator and remanent brethren of the said presbytery of —, require you D minister at —, elected and chosen by us to that effect, to pass, with the said Mr B, to the said kirk of —, upon a lawful and convenient day, and there to give institution to the said Mr B, as minister of the said kirk, by delivering to him the Holy Bible, or book of God, with the keys of the church-door thereof, and also

real

real and actual possession of all and haill the foresaid local and modified stipend, manse, glebe, office-houses, and pertinents thereof, above expressed, by delivering to him earth and stone of the ground of the said manse and glebe, to be bruiked, enjoyed, and possessed by him, as freely as any minister heretofore bruiked enjoyed, and possessed the same, and that during all the days of his lifetime, and serving the cure at the said church, wherethrough he may be answered, obeyed, and paid of the haill fruits and duties, great and small, of the said benefice, the crop and year of God —, and in all time coming during the space foresaid; after the form and tenor of the said letters of presentation above written, and these our letters of collation, and this our precept of institution, in all points. The which to do, we commit to you our full power, by these presents. [*Registration and conclusion as in the precept; and then say*], *Sic subscribitur, E* moderator, *F G, H I, K L*, witnesses. After the reading and publishing of the which letters of collation, and precept of institution above written, the said Mr *A*, by virtue thereof, in presence of me the said Notary-public and witnesses under written, and of the heritors, elders, and parishioners there convened, received and admitted the said Mr *B*, there personally present, to be minister at the said kirk of —, by delivering to him the Holy Bible, or book of God, who accepted thereof, with the keys of the door of the said kirk;

kirk; charging him, in the name of God, to use, discharge, and exercise the office and function of a faithful minister and pastor within the parish foresaid; and thereafter received the promise of some of the heritors, elders, and parishioners of the said parish, in name of the rest, for their obedience to the said Mr B, and concurrence with him in the work of his ministry: and thereafter passed to the ground of the said manse and glebe, pertaining and belonging to the said kirk, and there gave to the said Mr B, personally present, and accepting, as said is, real, actual, and corporal possession thereof, and of the constant local and modified stipend of the said parish, both parsonage and vicarage, and with free ish and entry, and all other commodities and privileges whatsoever thereto belonging, by delivery into his hands of earth and stone of the ground of the said manse and glebe, with the ordinary and usual solemnities; after the form and tenor of the said letters of presentation, and letters of collation, and precept of institution above expressed, and daily custom observed in the like cases, in all points, none opposing or contradicting the same. Whereupon, and all and sundry the premisses, the said Mr B asked and took instruments, &c.

By an article of the *claim of right*, in the year 1689, it is declared, That the subject hath full privilege to protest to king and parliament for remedy in law against the sentences

ces of the Lords of Session, provided these protests stop not the execution of the decreet pronounced.

According to which law, both pursuer and defenders, who conceived themselves lesed, and designed to make use of this privilege, did protest, in this manner. Within the space of ten days after pronouncing the sentence complained of, the party lesed, or an attorney, by a writing under his hand, impowered to protest, did compear at the inner-house bar, while the Lords were sitting, and produced a writ, signed by himself or his constituent, mentioning one or more of the reasons for which he conceived these interlocutors should be reversed; and, for remedy in law against the same, the party, or an attorney in his name, protested to king and parliament; and thereupon craved instruments of court. Which written protestation, with a piece of money in name of instrument-money, was delivered to the clerk to the process, or to any other of the inner-house clerks: and the Lords did admit the protestation. But because the clerks did not give extracts of such instruments, without special orders from the Lords, the party protesting brought with him a Notary, in whose hands likewise he took instruments, before witnesses present. And this was the manner used in prosecuting of the appeal before the union, and was so prescribed by *act 2. parl. 1695.* But now,

Since the union of the two kingdoms, the protestation

protestation or appeal for remedy in law, is prosecuted before the Lords Spiritual and Temporal in the parliament of Great Britain assembled, and the action thereon is prescribed by the laws of South Britain: so that the instrument of protest before noticed is now wholly in desuetude. However, a specimen is subjoined.

Instrument of appeal.

AT —, &c. The which day, in presence of the Right Honourable the Lords of Council and Session, sitting in judgment within the new session-house of the burgh of Edinburgh, in the parliament-close, and also in presence of me Notary-public subscribing, and witnesses after named, compeared personally *A* of — (*a*), and there represented, That it was declared by the *claim of right*, that it is the right and privilege of the subjects, to protest for remeid of law to the king and parliament, against the sentences pronounced by the said Lords of session; and he conceiving himself lesed by a sentence or interlocutor pronounced by the said Lords, in the process and action commenced and depending before their Lordships, at the instance of *D*, against the said *A*, upon the — day of —,

(*a*) Or, “*B*, as procurator and attorney, specially constituted by *A* of —, to the effect under written, conform to the letters of procuratory and attorney granted thereanent, of date the — day of —.”

D d

whereby

whereby the said Lords, & c. [*Here take in the interlocutor*], and that notwithstanding of all the grounds in law to the contray founded upon, and advanced by his lawyers, in the minutes of process, informations, and reclaiming petitions given in to the said Lords, for him, against the said *D*, in the process above mentioned: and therefore the said *A* (*a*) did appeal from the said Lords of Council and Session, to his Majesty and the Peers of the kingdom of Great Britain in parliament assembled, and protested for remeid of law, and that the said sentence or interlocutor might be reviewed and reversed by his Majesty and his said peers, as accords of law: an copy or schedule of which appeal and protestation (*b*), the said *A* presented and gave in to Mr —, one of the principal clerks of session, and clerk to the said process; and thereupon took instruments in his hands, and also in the hands of me Notary-public subscribing. These things were acted and done, publicly, in the audience of the said Lords sitting in judgment, as said is, in the new session-house of the burgh of Edinburgh, betwixt the hours of — and — before noon, place, day, month, &c.

HAVING now finished the matter of instruments, both as to heritable and personal

(*a*) Or, “*B*, as procurator foresaid.”

(*b*) Or, if there be a procurator, say, “with the said letters of procuratory or attorney, the said *B*, &c.”
rights,

rights, I shall, in the next place, by way of CONCLUSION, give some advices to Notaries in relation to a right discharge of their duty, and at the same time take occasion to consider the several punishments the law inflicts upon such Notaries as transgress in the practice of their employment.

CONCLUSION.

Advice to Notaries for right discharging their duty: wherein is shewn the punishment the law inflicts upon them, when they offend and transgress in the practice of their employment.

§ 1. OUR kings and rulers have provided divers good remedies against the evil which false Notaries, called by the civilians *Notarii putativi*, or others who were legally created, but were dishonest, might do to the republic: As, first, by *act 64. parl. 1503*, the bishops are ordered to call before them the Notaries within their diocese, and to take inquisition of their demeanour and fame, and to deprive the culpable, and to punish them according to their demerit. And moreover, the bishops are ordained to take inquisition of them that use false instruments, and, where it belongs to their office, to punish them, or to send them to the king. *Vid. supra, p. 20. § 28.*

§ 2. About the year 1540, it was observed, that, for covering fraud and falsehood, and to hinder the villany to be discovered, the false Notaries did vary their manual sign and subscription. To put a stop to this undue practice, by *act* 76. of the parliament held that year, the sheriff is ordained to call before him all laic Notaries within his sheriffdom, and to have a book, in which the Notaries to be admitted are to write their subscription and sign manual, sikelike as they subscribe all instruments, and as they will use in time coming; otherwise their instruments shall make no faith. And the ordinaries are ordered to do the like, with respect to Notaries within their diocese who are spiritual Men. *Vid. supra*, p. 21. & 24. And by *act* 79. *parl.* 1563, the Lords of Session are ordered, when they admit Notaries, (for that act gives to them the authority and jurisdiction), to cause registrate their sign and subscription which they shall use after their admission. *Vide supra*, p. 25. & *infra*, § 5.

As also, it appeared, that many Notaries had vitiated their protocol-books, by riving the leaves out of them, and by writing false instruments upon the blank paper, or by inserting of sheets of paper whereupon instruments were falsified by alteration of the dates of instruments; wherethrough the lieges were much damnified. For remedying this evil in some measure, by *act* 43. *parl.* 1555, all Notaries are ordered to compear before the Lords
of

of Session, bringing with them their protocols, to be marked by the Lords, the leaf numbered, and the blanks marked, &c. *Vid. supra*, p. 24. 34. and by *act* 45. *parl.* 1587. they are ordered to present before the Lords of Session their protocol-books, to be by them considered; and, if they fail, to be deprived. All instruments thereafter given forth by them are declared null, themselves declared transgressors of the king's laws, and to be punished as persons defamed and unworthy to bear office. *Vid. supra*, p. 34.

§ 3. Persons not authorised and admitted Notaries as the law prescribes, and yet practising as such, their instruments are by the above-cited *act* 76. *parl.* 1540, ordained to make no faith. See *Perez. ad tit. Cod. Si servus aut libertus ad decurionatum adspiraverit*, n. 5. *ad tit.* 50. *lib.* 12. *Cod.* n. 6.

§ 4. For punishment of false Notaries, and those that make false instruments, or who causes one to make false instruments, or who uses the same wittingly, it is by *act* 80. *parl.* 1540, statute, That such persons be punished in their persons and goods with all rigour, as it is provided by the disposition of the common law, both canon and civil, and by the statutes of the realm.

Now, by the civil or Roman law, *l. 1. § ult. ff. ad leg. Corneliam de falsis*, *Pœna falsi vel quasi falsi*, *deportatio est, et omnium bonorum publicatio; et, si servus eorum quid admisserit, ultimo supplicio affici jubetur: i. e.* Falsehood, or quasi false-

hood, is punished by deportation, or banishment, and publication or escheat of all the guilty person's estate and goods; and a bondman, if guilty, was to be put to death.

The civilians call *quasi falsum*, when a Notary, or any other called to write one's testament, writes to himself either a share of the heritage, or a legacy, or the like, even though the testator should dictate it accordingly, the law punishing this *quasi* falsehood in the same way as the other, *tit. Cod. de his qui sibi adscribunt in testamento, et Brun. et Perez. ad d. t.*

Lawyers are of opinion, that, to infer this crime of falsehood, it is sufficient if the false instrument be formed with all the solemnities, and that it can hurt another, *Brun. ad l. 8. Cod. b. t. n. 6. & 7.* And again he observes, upon *l. 20.* of that title, that falsehood is not said to be committed where there is not fraud or dole. The making an instrument to bear a false date, and not the true time when the matters therein mentioned were transacted, infers falsehood, *l. 15. Cod. b. t. & Brun. ibid. n. 3.*

An instrument or other writing perfected by all the solemnities requisite in law, is presumed to be true; so that the user needs not prove the verity of it, unless by ocular inspection it appear to be suspicious, or when the Notary, or his subscription and seal is not known to any, *l. ult. Cod. ad l. Cornel. de falsis.* But although it be not suspect in appearance,
it

it may be false, and the other party may prove its falsehood.

Wherefore, he who uses a false instrument, is undoubtedly presumed author of the falsehood; or, being participant of it, is made guilty, unless he prove his innocency, by producing the person from whom he got the instrument, and by declaring that he will abstain from using it: for otherwise the sole use of the instrument subjects one to the pain and guilt of falsehood, though he was not maker and writer of it, *l. 8. Cod. ad l. Cornel. de falsis*. See *Perez. ad d. t. n. 3. vol. 2. p. 189.* Menochius, in his *Arbitrary cases, case 315. n. 29.* says, that this declaration and repentance is received at any time before sentence; and makes a distinction between the user, and the author of the false writing; which last cannot escape being processed, though he would abstain from the use of it; for by the act or writing the guilt is closed: whereas, in the other, the use makes the guilt; so that the user, by withdrawing in time, is free from the punishment inflicted on falsaries, *l. 13. § 1. ff. ad l. Cornel. de falsis*; but not from a pecuniary mulct imposed at the discretion of the judge, nor from the expenses of plea, *Ant. Faber, in Cod. b. t. defin. 10. c. 12.*

By *act 43. parl. 1555*, it is statute, That Notaries convict of falsehood, or who shall, after they are discharged by the Lords, use the

the office of Notary, shall be punished by the escheat of their moveable goods, to the use of the sovereign, shall want their right hand, and shall be banished the realm for ever, and shall further lose their life, as the quality of the cause requires, at the discretion of the judge: and the causers of these falsehoods are ordained to receive the same punishment. *Vid. supra*, p. 25. and *act* 22. *parl.* 1551, and 78. *parl.* 1563.

The modern common law in Europe makes the punishment of falsehood arbitrary, which may, in certain cases and circumstances, be extended even to loss of life, as in *l. 1. pr. § 1. ff. ad l. Cornel. de sicariis. Vid. l. 22. fin. C. d. ad l. Cornel. de falsis, et Wesenb. ad l. Cornel. de falsis, n. 12. Gron. de H. abrogatis, § 7. Instit. de publicis judiciis*, and the authors there cited, and *Deut. xix. 16. § seqq.*

To banishment and escheat of goods, appointed by the Roman law, our statute superadds the loss of the right hand; which is taken from the feudal law: *Scriba vero, qui falsum alienationis instrumentum sciens conscripserit, post amissionem officii, cum infamiae periculo, manum amittat, F. 2. tit. 55. de probibita feudi alienatione, per Fridet. vers. Callidis insuper machinationibus, &c.* But the feudal law not defining which of the two hands should be cut off, the feudal lawyers determine that the false Notary should lose the hand with which he writ the false instrument; for they say he should be punished in that hand which trespassed,

passed, that he may not a second time commit the like crime, *Alvarott. de feud. c. de prohib. feud. alien. per Frid. § Scriba, n. 4.* And the writing hand being regularly the right one, our statute orders the loss of it. And the reason of this punishment seems to be grounded upon the equity of the thing; for it is but reasonable that that part of the body should suffer, which committed the crime. And we may observe in Sueton, in the life of Galba, *c. 9. p. 467. in us. Delph.* where he caused cut off the hands of a banker who dealt unfairly, and caused nail them to his counter. See the same author in the life of Claudius, *cap. 15. p. 371. and l. 3. Cod. de servis fugitivis.* As also, we see something of this nature warranted by the Levitical law, *Deut. cap. xxv. v. 12.*

By a decision, 14th July 1638, Dunbar *contra* Dunbar, observed by Durie, the Lords remitted Thomas Tulloch, and William Forsyth Notary, to the justices, to be proceeded against according to the course of law, which inflicts death for forging a charter. But because Forsyth the Notary had confessed ingenuously at the first, and contributed greatly to the trial, by declaring all the circumstances of the forgery, they recommended to the justice-general to spare his life, and inflict any other punishment, so as the same might be spared.

§ 5. As to Notaries not duly admitted, it is statute, by *act 79. parl. 1563*, That none
exerce

exerce the office, under the pain of death, unless they be (created by the Sovereign) examined and admitted by the Lords of Session, and their instruments or notes are ordained to make no faith. *Vid. supra, p. 25. and § 2.* Nevertheless Sir George Mackenzie, following the civilians, observes upon *act* 78. of this parliament, that it has been found, that evidents subscribed by Notaries once admitted, though they are after discharged, are valid, they having still been habite and reputed to be Notaries. For though the Notary be deprived, it will not vitiate the instrument taken *bona fide* by persons who knew not his deprivation, till it be commonly known, or letters of publication intimate at the market-cross. But this is not indulged to instruments taken and written by those who never were admitted to the office: for they are punished to death, and their instruments are wholly void and null, *arg. l. 7. Cod. de numer. actuariis, &c.*

§ 6. When there is no external proof for indication of the falsehood of an instrument, and yet the Notary owns and affirms, that, in the forming and extending of it, he asserts what is false, the doubt is, What can be the effect of this confession? For solving of it, notice the position, That credit is not to be given to a Notary, affirming, even in the point of death, he wrote what is not true, when by this declaration there ariseth prejudice to a third party, *Surd. decis. 107. & 135.*
Tyraquel.

Tyraquel. in his treatise upon *l. 89. § 1. ff. de verb. sig. n. 9. p. 365.* instances a question moved by Baldus, If we shall stand to the saying of a Notary compearing in judgment, and saying, that, in the instrument set forth in the libel, he did commit an error? And though Baldus says, first, that it would seem the parties ought to stand by the declaration of the Notary, because for that end they chused him; yet in the end he concludes the contrary, for this reason, That the election and commission of the parties is to be understood of the first act; and so it would appear the Notary was chosen and commissioned, that he might testify but once, and not that he might correct and undo what he had so said. And it is the vulgar opinion of lawyers, *Quando testis diversimodo in judicio deposuit, statur primo dictu*, as is observed by Surd. in *decis. 135. n. 12.* See the authors there cited.

§ 7. If a Notary hath dolously or fraudfully omitted to insert in his instrument any thing material or substantial, he is in law liable to the party lesed for damage and interest, which may be liquidated by an oath *in litem*. See *Brun. ad l. ult. Cod. de magistratibus conveniendis, n. 2. & 3.* and the lawyers there cited. And when a Notary leaves out of his instrument, what by custom and style of such writings he ought to insert, he is to be punished; for it is not in his power to dispense with such; for he is presumed to know the laws and common customs of the country. Again, lawyers
are

are of opinion, that, in a Notary unskilful of his profession, the mistakes should be imputed to fraud and dole, rather than to ignorance, it being a shameful thing for him to be ignorant of what pertains to his office; yet nevertheless he is not to be punished as a falsary, *Arn. Ferron. comment. in consuetud. Burdigal. § 12. tit. de feud. p. 274.* and the authors there cited. But a Notary is to be punished for drawing a contract that is prohibited, as those wittingly contrived to be usury, and yet to escape the pains of law inflicted on such persons, *Alvarot. de feud. c. de probib. feud. alien. per Frid. § Scriba, n. 1. fol. 266. Gasp. Ant. Thesaurus. in Quæstion. Forens. q. 36. lib. 1. p. 93.* mentions a case of a Notary, who being required to form a testament thus, "I institute Caius to be my heir, so that he cannot dispose of my goods above two hundred pounds; and in the remainder I institute the children of the same Caius," did, in place of that, institute Caius universal heir, but so as that he could only dispose of L. 200, and thereafter did substitute Caius's children. And thus, as to the children, in place of an institution, he made a substitution; between which there is a substantial difference. This being complained of, a question was moved for condemning the Notary of falsehood; for the changing of the truth may be so called. But it was alledged for the Notary, that there appeared more of error and ignorance, than of falsity, which is not lightly

lightly to be admitted or presumed; and that one's deed should be interpreted many ways rather than denominated false. The senate of Piedmont acquitted the Notary from falsehood; but, because there was a manifest instance of his ignorance and unskilfulness in his profession, when he knew not the terms of law, and the difference between institution and substitution, they deposed him from the office of Notary.

§ 8. Notwithstanding a Notary must understand the common principles of the law and practice, and must have knowledge of the style of the writings, obligations, or conveyances, &c. in ordinary daily use; yet he is presumed to be ignorant of the force in law, and of the import of the clauses in these writings: and therefore he is not to add, out of his own head, substantial clauses, extraneous to the common style, unless he be specially required; for his duty lies chiefly in noting what is said and done between and among parties, without adding any thing of his own, and to put it in a formal instrument. Nicolas Everhard, in his book of *Law-consultations, consil. 26. n. 4.* cites *Lud. Roman. in lib. singularium, singular. 53.* for saying that Notaries are as a pyot or parrot caged in their masters lodgings, which speak without knowing what they say; inferring, that a Notary is not to be much credited, upon simple affirmation, with respect to clauses out of the ordinary style; and, as to the common clauses, he is presumed to have

been required and desired by the parties to insert and illustrate or amplify them by the accustomed words, though these amplifications were not to be found in his note or protocol book; for, by reason of his oath *de fidei*, made at his admission, he is not presumed to write or insert what is false, *Tyraquel. de jure constit. possess. part. 3. limit. 31. n. 7. & 9.* And though these accustomed clauses were not set down, yet they are supposed as if they were inserted; according to the brocard, *Id quod solet apponi in contractu, vel alia dispositione, habetur pro appposito, etiamsi id non sit factum aut scriptum, Tyraquel. ibid.* And it is the duty of a Notary, to insert in his instrument what the law and custom of the country hath introduced: *Notarius semper censeatur rogatus a partibus, ut clausulas consuetas apponat, et illæ de voluntate contrahentium censeantur appositæ secundum juris nostri principia, Anton. Thesaur. lib. 2. q. 91. n. 6. p. 392. et Craig, lib. 2. dieg. 7. Notarius formam solitam observari curabit, &c. et arg. l. 31. § 20. ff. de ædilitio edicto.*

§ 9. A Notary must not officiously press and thrust himself upon mens business, but expect to be called and required by the parties to take instruments in relation to the business laid before him, and to assist them therein as his office enables him; and the lawyers make this calling and requisition necessary to validate the Notary's instrument, and that the instrument bear it, *Craig. lib. 2. dieg. 7. Harprecht. de processu judiciario, et Maximil.*

Maximil. constit. concerning Notaries in the year 1512, § 1. *in fin. et supra*, p. 53. As also, he ought to make attestation for no other thing than what falls under the senses of his body, and which he distinctly perceives, *Surd. decij.* 284. n. 2. p. 546. *et Rob. Marant. disput.* 6. n. 35. p. 518. *Notarius non creditur de his quæ consistunt in animo contrahentium; et autor. Art. Notariat.* p. 173. 174. *et Craig, lib.* 2. *diag.* 7. *Generaliter hoc tenendum est de notariis, ut fides illis tantum adhibeatur in iis quæ sub sensum cadunt: nam si notam dederint de ea re quæ sub sensum non cadebat, non creditur.* In matters of his own concern, he cannot take instruments that are to make faith; for he cannot be both Notary and party. *Vid. aut. Art. Notar.* p. 192. q. 6. Neither can he discharge that office, and be procurator for a third party in his own instrument. *Vid. supra*, p. 55.

§ 10. The office of a Notary being public, *i. e.* for the welfare of the people, and useful to the commonwealth, he can be compelled and forced to assist parties in their affairs wherein help is necessary and required, *Brun. ad l. 9. Cod. de defensor. civitatum*, n. 6. *Perez. ad d. t. n. 9. et aut. Art. Notariat.* p. 212. q. 35. But then he must be ensured of a reward, and of payment for his pains; otherwise he is not bound to serve, *Rob. Marant. specul. aur. tit. de actor. editione*, n. 59. p. 385. Though he should take nothing from poor people, *Brun. arg. l. 28. Cod. de episcop.*

audient. n. 5. Eodem modo protocolium tabellarit, sive notarii, partibus contrahentibus commune esse debet, proinde si notarius requisitus, nolit exhibere protocolium, mandatis pœnalibus ad instantiam alterutrius partis ad hoc compelli protest; nam notarius qui non edit, est in dolo præsumpto, et ad interesse tenetur, Gail. Pract. obs. l. 1. obs. 106. n. 6.

§ 11. When a Notary is about to write an evident or conveyance, he ought to make a note of all that the parties concerned design, and do agree to have done, and according thereto precisely to form the writing; but before extending it in a scroll or sketched copy, consult with himself, 1. What the law has determined in that case; 2. All the pleas and controversies that have occurred on that head, and the decisions given thereon, that thereby he may receive direction and instruction at the cost of others; and, 3. That he may keep his employers from all occasion of future dispute. For he ought to think with himself, what is possible to fall out, that might occasion questions in the agreement, either from the circumstances of the persons, or from the nature of the subject-matter of the contract; but chiefly, that in all and in every part of the writing he should be at much pains distinctly to express the meaning of the parties, in plain obvious words; avoiding phrases ambiguous, and such as are capable of a double understanding or sinister interpretation; evincing as much as is possible tautologies in the
exegetic

exegetic expressions, and unnecessary repetitions of the same thoughts or words. But, after all his labour on this head, he may perceive, that, upon examining into the pleas that have hitherto occurred about the meaning of parties, or the interpretation of words and expressions in writings, and the questions moved concerning the manner of their application, he will find great truth in what an ancient lawyer said, *That the dispositions of the dead depend much upon the arbitrement of the living*; and from his own experience he will be convinced, as Johan. Grivellus writes (*Decisione Dolona* 122. n. 1. & 3.) of the doubtful and hazardous event of these pleas and questions, concerning the interpretation and meaning of mens words in the disposal of their estate; that in these, as in all other cases that are, or can be made doubtful, every one has a peculiar apprehension, a singular taste, and personal judgment, many time different from one another; and it may be diverse from what the party himself intended.

§ 12. When a Notary is called to take an instrument upon any occurrence, he makes and writes in a loose paper, or upon one of these evidents which relate to the business, a note of what passed; which he extends into an instrument, recorded in his protocol; out of which he gives an extract. Now, if it happen that there is a difference between the note or abbreviate, and the copy in the protocol-book, it is queried, which of the two

are to be followed and believed? Gasp. Anton. in his *Quest. Forens. lib. 3. q. 87.* says, that if it be doubted that the instrument delivered to the party agreeth not with the authentic in the protocol, that in the protocol, out of which the instrument is extracted, is only regarded: for Notaries are or ought to be exact in writing and filling up their protocol before they give out the extract, and the principal makes greater faith than the copy. But, in the case proposed, Anton. in the above-cited question, tells us, that the parliament of Piedmont determined, that the note or abbreviate, which is reckoned the original mother and fountain of all that followed, is more to be credited than the copy in the protocol. However, these questions have no place with us: for our practice doth not allow to alter their writings or instruments after they have been once produced in judgment; and faith is only given to a formal instrument signed and attested by the Notary; nor to that neither in many cases, except it be signed by the witnesses present at taking thereof.

§ 13. Further, it is doubted among lawyers, if a Notary can supply or add to an instrument, clauses not written in his note or abbreviate, and not inserted in the instrument recorded in the protocol book. *Surd. decis. 223. n. 2. p. 410.* says, that a Notary cannot insert in the instrument, what is not to be found in the note, except there be in it an *et cet. &c.* which he calls *clausula ceterata*; and

and even in that case he cannot alter the substance and facts. And in *decif. 213. n. 7. p. 388.* a Notary may, to his instrument, add what he through simplicity or mistake hath omitted.

§ 14. As it behoved to be proven by the witnesses or confession, that the Notary had mistaken the words and order of the testator, so hence another question doth arise, when there is a discrepancy betwixt the tenor of the instrument as attested by the Notary, and the depositions of the witnesses present at taking of the instrument, if more credit should be given to the first than to the second? To which it is answered, That, in competitions of credulity, the Notary, who is a public person, and being of good fame, is more to be believed than one of the witnesses; but the deposition of two, or more, of the witnesses present, preponderates and over-rules the attestation of the Notary. For, in such cases, the Notary is in place but of one witness, *Joa. à Beust de jurejurand. p. 478. n. 389.* But two witnesses conclude in law, and one doth not. And, in the like case, *Gasp. Ant. Thesaur. in Quest. Forens. lib. 1. quest. 31.* observes, that there is place for action of falsehood against the Notary, and that he had seen the judges proceed to torture of the Notary. But there will be with us in matters of moment little occasion for this controversy, seeing by *act 5. parl. 1681*, it is declared, That no witnesses but subscribing witnesses shall be probative in
writs

writs of importance, as mentioned in the act. This law seems to be borrowed from France, where, for removing these difficulties, it is by the *Regal Constitutions* ordained, that parties and witnesses subscribe all acts. See Thesaur. in the above-cited question, n. 6. p. 67.

§ 15. Notaries, when employed by subject-superiors to make out charters for their vassals, ought to form them in the best style, upon parchment, in Latin: for such Notaries as draw informal charters, are liable to be deposed, and otherwise censured, by the Lords of Session.

§ 16. In taking of seifins, Notaries ought carefully to observe the solemnities mentioned in the second title of the second part. For, in omitting of any of them, they may be deposed and punished by the court of session. As also they ought carefully to insert their long docket: for Sir Thomas Hope relates, that a seifin was found null because it wanted these words, *vidi, feci, et audiui*, title *Seifins*, — *Primrose contra* —. And likewise they ought diligently to observe how the lands hold, whether ward, or feu, containing a clause *de non alienando, et non contrahendo debitum, sine consensu superioris*: for in any of these cases, subaltern seifins before confirmation cannot be taken without incurring recognition. And the Notary ought regularly to write and extend instruments of seifin with his own hand; but if he does not, the docket subjoined must always be written by himself:

self: and in case the instrument is written by another, the docket must bear it to be *manu aliena fideliter scriptum, me aliis rebus occupato. Vid. auth. Art. Notar. p. 13. and Craig, lib. 2. dieg. 7.* The writer of instruments of seifins need not be designed: for seifins come not under the act of parliament 1593, not being writs made by parties, as that act means; but the act of a Notary; as was found, 26th June 1634, Lord Johnston *contra* Earl Queensberry, observed by Durie.

§ 17. In p. 46. and 47. of this treatise I have given the dockets used in attesting copies of writs, or subscribing papers for those that cannot write; it remains, in this place, to give the Notary some general directions thereanent. And, first, as to attesting copies of writs, there are requisite two Notaries and four witnesses; and the Notaries ought to make out a fair clean copy of the writ to be attested, without rasings, interlineations, obductions, or alterations of the letters, subjoining the subscriptions of the parties and witnesses, and thereafter compare the same with the original before the four witnesses, and then adject the docket referred to above, with their own and the witnesses subscriptions. To this docket some Notaries add their short one; but that is superfluous; for no more is requisite than the docket above mentioned, and their distinction as Notaries.

But, in the subscribing of writs for persons who cannot write, greater care and circumspection

spection is requisite: wherefore, in order to illustrate this matter, it is necessary to know, that in ancient times, as in other states, so in Scotland, every one, or the greatest number of people, could not write, and subscribe their names; wherefore, in supplement, as among the Romans, they made use of seals, which, in token of their being bound by the writing, the parties appended, and affixed, which was sufficient: and as this custom was in Scotland before the days of King David, so by the *Reg. Maj. lib. 3. cap. 8. n. 3. & 4.* it was authorised and made a law.

In the case of Mr Andrew Cadzow, January 21. 1503, mentioned by Balfour in his *Practics, tit. Instruments, cap. 5.* I find, that if the seal of an evident be crushed and broken, in such sort that the owner of the evident fears it may perish entirely in a short time, it is declared, the Lords, or any other judge-ordinary, at the owner's desire, may take the depositions of divers famous witnesses who knew the man to whom the seal pertained, and recognise the same, and thereafter transume that evident, and ordain that the transumpt shall have as great faith in judgment and outwith the same, in all time coming, as the principal itself; provided, that all parties having interest in the said matter, if any be notoriously known, be lawfully warned and summoned hereto. This practice serves as a proof, that a seal alone, without any subscription, was at that time sufficient; and it seems
this

this custom continued until the year 1540, when there was an act of parliament made thereanent, to prevent several inconveniencies, as mentioned in the act, which shall be noticed hereafter.

Monf. Pasquier, in his book *Les recherches de la France*, lib. 4. cap. 13. shews, that there was a time when in France the signing of writings was not known; but says, one ought not to think that it proceeded from ignorance, but from an unaccountable long custom that had crept in among them; and he rehearses an expression of St Bernard, in his *epist.* 130. *Sigillum non erat ad manum; sed, qui leget, agnoscet stylum, quia ipse dictavi.* And the like is to be found in *epist.* 339. *Materies locutionis pro sigillo fit, quia ad manum non erat.* If he had subscribed his name, he needed not to have supplied the want of his seal by his style, to make known who had sent these letters. And he further observes, that, in his days, that custom obtained in all Germany and Swisserland; yea moreover he says, When I see that contracts perfected before Notaries, bear not execution but by means of the seal, I make myself almost to believe, that the tabellions in ancient times did not sign or subscribe.

When the Kings of Spain are, by the gout or other disease, become so infirm as that they cannot with a pen subscribe dispatches or other public writings which ought necessarily to be subscribed with their hand, they make

a little instrument of gold, as a mark, which they call *Stampiglia*, on which these words are engraved, *To el Rey*, i. e. *I the King*; which instrument being dipped in ink, is applied by the chief ministers, upon the paper or parchment, in the place of the subscription; and thus it hath the same force as if it were written with a pen in the king's own hand. And in this manner Charles II. late King of Spain, in the year 1700, signed the testament that hath made so much noise in the world, whereby the succession in the Spanish territories was conferred on Philip V. now reigning, a son of the royal family of France, to the great disappointment of the house of Austria.

There is in Scotland an instrument like to this *Stampiglia*, called a *Casbet*, of silver, on which all the letters of the king's name, as he uses to write, are engraven, which is applied to signatures, the warrants of such gifts and charters as formerly the Lords of Treasury, and now the Barons of Exchequer are authorised to expedite, without the king's proper hand-writing; and which has been in use since the union of the two crowns of Scotland and England in the person of King James VI. in the year 1603: before which time, when our king resided here, all public writings relating to the king's revenue, or government of the state, were subscribed by the king's own hand; but now he writes his name on the top of the signature, or other writing, and the

the secretary signs at the foot; so the casket is applied at the top of the signature, and subscribed by the Barons of Exchequer. This casket is in the charge of the keeper of the great seal for Scotland.

But sealing of writs, in place of subscribing, being found very dangerous, because seals were liable to be lost or forged; therefore, by *act 117. parl. 7. James V.* it is statute, "That, in time coming, no faith be given to any obligation, bond, or other writing, under a seal, without the subscription of him that owes the same, and witnesses; or, if the party cannot write, with the subscription of a Notary thereto." And this act is further illustrated by *act 80. parl. 1579*: for there it is statute, "That all bonds and obligations of great importance, to be made in time coming, shall be subscribed and sealed by the principal parties, if they can subscribe, otherwise by two famous Notaries, before four famous witnesses, &c." Sealing is now out of use, and is not necessary in any private writ by our present custom; as also the leading of the parties who subscribe by the Notary, as enjoined by *act 29. parl. 1555*. In our practice, all writs exceeding *L. 100 Scots*, are interpreted writs of importance, requiring two Notaries and four witnesses: for, in a decision, 13th November 1623, Marshall *contra* Marshall, observed by Durie, the Lords "found an obligation of *L. 100* null, which was subscribed by a Notary and four

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" witnesses,

“ witnesses, because it was not subscribed by
 “ two Notaries; and found any writ bearing
 “ L. 100 and above to be a matter of im-
 “ portance; and would not suffer the party to
 “ retrench the obligation to any less quantity,
 “ inferior to the sum therein expressed.” As
 also see the 18th December 1668, Swinton
contra Brown, observed by Stair. And the
 subscription of four witnesses is as essential a
 solemnity, as that of two Notaries: for, by a
 decision 31st January 1623, Fotheringham
contra Watson, the Lords “ found an obliga-
 “ tion null, albeit it was subscribed by two
 “ Notaries, because it was only subscribed by
 “ three witnesses.” As also see the case of
 Leckie *contra* Cuninghame, 20th November
 1627, both observed by Durie; and the 13th
 December 1671, and 5th January 1672, Jack
contra Jack, observed by Stair.

Contracts of marriage whereupon marriage
 followed, although subscribed but by one No-
 tary, have for ordinary been sustained, al-
 though the sums therein were far exceeding
 L. 100 Scots; as may be seen by several deci-
 sions; particularly Grieve *contra* Cant, *penult.*
 March 1626; Nisbet *contra* Newlands, De-
 cember 10. 1630; and Lockhart *contra* Sim-
 son, *ult.* February 1637; all observed by
 Durie; and Breadie *contra* Breadie and Muir,
 1st July 1662, observed by Stair. As also
 testaments, though containing matter of great
 importance, will be valid, although subscri-
 bed but by one Notary: and by *act* 133. *parl.*

1584, ministers are authorised as Notaries, in the case of testaments. *Vid. supra*, p. 26. And by a decision, 18th January 1678, Gray *contra* Lady Ballegerno, observed by Stair, a testament naming tutors was found valid, where the defunct, not being able to subscribe, and having given warrant to ministers to subscribe for him, died before they fully subscribed the same. But if, by the laws of the place where the paper is subscribed, one Notary be sufficient, it will be sustained; as was found 11th January 1676, Paton *contra* Pitcairn, observed by Stair: in which decision, a factory made by a stranger in Holland, and subscribed by one Notary, was found valid, seeing by the custom of Holland no more than one Notary is required.

A Notary ought to know the persons for whom he subscribes, lest one should assume the name of another. G. Anton. Thesaur. mentions a case, (*quest. 78. lib. 2. p. 362.*), wherein a notary being accused of falsehood, because he had given a discharge before witnesses in absence of the creditor, one having personated him, the judges agreed, that the Notary ought not to be punished as a falsary. But it was questioned, whether or not he should be punished as having committed a malversation in his office? Some of the judges were of the opinion, that although Notaries were rash in subscribing for persons they did not know, yet the fact was not punishable; seeing no punishment was prescribed by law

against Notaries subscribing for persons they did not know, when they were called and required so to do; and a Notary being a public person, he might, being required, subscribe for any one; and where the law did not make a crime, the judges could not condemn. Others were of opinion, that the Notary was culpable, especially as he had acknowledged he had been required by a person he did not know; and that he might be brought into a legal suspicion of fraud. The judges determined, That although, in cases where there is no peculiar law or statute, the Notary could not be punished to the utmost rigour; therefore they found he had committed a malversation in his office, and fined him in fifty pounds. And by act of sederunt, 21st July 1688, Notaries are "discharged to subscribe
 " writs for persons who cannot write, unless
 " it either consist with the Notary's know-
 " ledge, that he for whom, and at whose
 " command they subscribe, is the person de-
 " signed in the writ; or that the same may
 " be attested by those who subscribe witnes-
 " ses to the Notaries their subscription, or by
 " other credible persons; and which the No-
 " taries are to mention when they subscribe
 " for the party."

The Notary ought likewise carefully to observe the condition of the person for whom he subscribes, that he be sound in memory and judgment, and capable to understand the nature and design of the paper which the No-
 tary

tary is to subscribe for him, so as to give him warrant distinctly, in presence and audience of the witnesses. And, in evidence thereof, by *act 5. parl. 1681*, *the party must touch the Notary's pen*. This warrant, or command, given by the party to the Notary, is an essential solemnity, and must be expressed in the Notary's docket; otherwise the disposition or other writ will be null, and cannot be supplied by the witnesses inserted in the paper; as was found the 26th July 1667, Philip *contra* Cheap, observed by Stair. But if the Notary shall, when the party is incapacitate to give warrant and command, subscribe any writ for him, he is liable to be deposed, and otherwise censured by the Lords of Session; as was found 20th November 1680, Stewart *contra* Smith, observed by Stair; where two Notaries, for subscribing a testament without warrant, were deposed from their office, and the sheriff of the shire wherein they resided was ordered to send them both to *Edinburgh*, in order that they might be set upon the cockstool, with a paper upon their brows.

This subscription of the two Notaries and witnesses must be at one and the same time, *unico contextu*; for the law doth no more trust Notaries subscribing separately, than it doth the testimony of singular and not concurring witnesses. And this seems clear from the statute itself above cited, *act 80. parl. 1579*, requiring the writs to be subscribed by two Notaries, before four witnesses, *being present at the time*;

time; which implies, that both the Notaries must subscribe before the witnesses then present: whence they are called *Conotaries*. See Macmoran *contra* Black, January 23. 1624, and Cow *contra* Craig, 20th March 1633, both observed by Durie. And this seems to be confirmed by the authority of the civil law, *novel. 73. cap. 8.*

§ 18. Notaries are likewise censurable, if they shall omit to insert in their instrument what by the parties they are required to insert, although the points be not a solemnity necessary in such instruments: but these points which are no part of the solemnity, must be abstracted by the witnesses inserted in the instrument.

§ 19. All the other duties of Notaries are reduced to the having of such an entire fidelity, and taking all possible care to avoid, in the discharge of their office, every thing that may be contrary to justice and truth, so as that they may commit nothing on their part against either of them; for that would be to violate in the highest degree their first and chief duty: and that they have no hand in any fraud, but that they oppose all such ways, if the party should offer to make use of them: and that they make themselves instruments of promoting justice and peace between the parties; on which depends the quiet of families, the security of estates, the validity of engagements, the ties of partnerships, and of all sorts of commerce of the greatest moment:
and

and that they mediate and negotiate affairs to all persons in a manner that is suitable to an office that is so necessary and of so great importance: and likewise they ought to proportion the profits or recompense to which they may pretend, not to this great consequence of their ministry, but to that which custom, the regulations of the places, and an upright integrity, altogether void of interest, will allow them to take; moderating even the fees which they may justly claim, with respect to persons who are not able to pay them according to their labour; and that in consideration they frequently receive gratuities from other persons far above what they could reasonably expect.

Finally, All Notaries are to advert, that they should be skilled in the law, at least in those parts of it which respect their office, and to be able to make known to the parties who employ them, the solemnities and other things required in law, for bringing to good effect their purposes and design; and moreover to understand those affairs and acts, from which, as being reprobated and prohibited in law, they should abstain; whereas otherwise Notaries are liable to parties for damage and interest they may sustain through their ignorance.

I have here given to Notaries the most general principles and fundamental rules to be known and observed in the exercise of their office; upon which I would not have them

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to sit down, and rest themselves satisfied without going further; but I advise them to learn and diligently notice the laws and practice of this kingdom and other places, which may have any respect to their art and office: and as for those cases which, upon account of their variety and diversity, may have difficulty and ambiguity, I counsel them not to trust over much to themselves, but to have recourse to others more learned in the law, that, through their want of knowledge in this art, or by their default, none come to be prejudged; seeing, as has been said already, they will be bound to repair the damage of parties flowing from either of these causes.

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